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REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

During June Term, 1847, and part of January Term, 1848.

50572

VOLUME XII.

J. J. ORMOND, REPORTER.

TUSCALOOSA:

PRINTED BY M. D. J. SLADE.

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BY J. J. ORMOND,

In the Clerk's Office of the District Court of the United States for the
Middle District of Alabama.

2005

OFFICERS

OF

THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

HENRY W. COLLIER, CHIEF JUSTICE.

JOHN J. ORMOND,

HENRY GOLDTHWAITE,* } ASSOCIATE JUSTICES.

EDWARD S. DARGAN,

* Judge Goldthwaite died 19th October, 1847, and Hon. Edward S. Dargan was elected to fill the vacancy, on the 16th day of December, 1847.

THOMAS D. CLARKE, ATTORNEY-GENERAL.

Until his death, August 25, 1847. WILLIAM H. MARTIN, Esq. was appointed by His Excellency the Governor, to fill the vacancy.

JAMES B. WALLACE, CLERK.

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REPORTS

OF

CASES ARGUED AND DETERMINED

AT THE

JUNE TERM, 1847.

MCLEOD v. POWE AND SMITH.

1. It is no objection to a count that it states the facts from which the conclusion of indebtedness arises, instead of stating the same conclusion in a common count.
2. Under a special contract to sell slaves to one upon the payment of a sum certain at a specified day, the title vests in the party to whom they are to be sold by the tender of the money, and when the tender is made by an administrator and refused, yet the administrator by the act of tender and refusal becomes the bailee of the money, and as such may be sued by the executor of the other party, where he has successfully sustained an action of detinue on the ground that the title vested in the estate by the act of tender.

Writ of Error to the Circuit Court of Wilcox.

ASSUMPSIT by McLeod, as the executor of R. G. Gordon, against Powe & Smith. The cause of action set forth in the declaration is this :

On the 7th February, 1842, the marshal of the United States for the southern district of Alabama, having an execution in hand issued from the circuit court for that district, in favor of one Clapp for \$3558, with interest from the 4th January, 1838, against one A. K. Smith, levied the same on certain slaves as his property. Whilst the slaves were thus

under levy, Gordon, in consideration of the natural love and affection which he bore to his sister, she being the wife of said A. K. Smith, and for other considerations, contracted and agreed with Smith, both verbally and in writing, dated the 12th March, 1842, to become the purchaser of the slaves at the marshal's sale, and on the 11th March, 1842, did become the purchaser at that sale of the slaves, at the sum of \$4832. It was further agreed to leave the slaves in the possession of Smith until the 1st of January, 1844. It was further agreed, that on the payment of the said sum of \$4832 by Smith to Gordon, on the 1st January, 1844, that the said slaves should revest in, and the title be reconveyed to the said Smith. Gordon and Smith both departed this life previous to the 1st January, 1844, and previous to any payment of the said sum, and after the death of Smith, the slaves went to the possession of the defendants as administrators of his estate, as did also the written agreement evidencing the said contract for reconveyance. On the 26th December, 1843, the defendants, with a view to carry out the said contract, tendered to the said plaintiff, as the executor of Gordon, the sum of \$4832. This tender the plaintiff refused, and the said slaves, on the 1st January, 1844, were, and ever since then have remained in the possession of the defendants.

On the 1st January, 1844, the plaintiff demanded the slaves from the defendants, and afterwards, on the 12th December, 1844, commenced an action of detinue against the defendants to recover the same in the circuit court of Wilcox county. To this action the defendants pleaded the tender aforesaid, and by reason of this plea and the proof to sustain it, a verdict was found for the defendants at the spring term, 1846.

The declaration then proceeds with the averment that the defendants have never paid the plaintiff the said sum of \$4832 so tendered as aforesaid, but that they still hold the same as his money as executor. Also that the estate of Smith was represented by the defendants as administrators to be insolvent, and it was so declared by the proper court. That in the schedules, &c. of this report, no return was made of said money as assets of Smith's estate. It then proceeds to aver a demand of the said sum from the defendants on the

1st January, 1846, and their promise to pay the plaintiff as executor, and concludes with a *super se assumpsit*.

The defendants demurred to this declaration, and the court gave judgment in their favor. This is the only error assigned.

E. W. PECK, for the plaintiff in error insisted—

The legality of the tender operated to vest the title to the slaves in the defendants as the administrators of A. K. Smith, and the money tendered by the same act ceased to be assets of the estate of the said A. K. Smith in the defendants' hands, (which it was before), and thereby became a part of the estate of the plaintiff's testator, R. G. Gordon, notwithstanding his refusal to receive it; it therefore remained with the defendants, not as administrators, but as mere depositaries for the use of the plaintiff as executor as aforesaid, and on his demand they became personally liable for its delivery, and consequently this action was properly brought against them, not as administrators, but personally. [Legro v. Lord, 1 Fairf. 161; 3 U. S. Dig. 514, § 24; Chipman on Contracts, 86, 87, 196, 209-10-11-13-16 and 19, and 88, and the cases referred to by this author; Lamb v. Lathrop, 13 Wendell, 97.]

No counsel appeared for the defendants in error.

GOLDTHWAITE, J.—1. The pleader here, instead of relying on the general allegations that the defendants have received money to his use or admitted their indebtedness by an account stated, has preferred to state the facts from which he deduces their indebtedness as a legal conclusion. We are not aware of any sufficient reason why this course may not be pursued, as, when all is said against it, no other question is presented by the demurrer than would be if the same facts were shown in evidence and a general charge demanded as to their sufficiency to entitle the plaintiff to recover on the common counts. We shall therefore proceed to consider whether the facts stated authorise the party in suing the defendants personally, and not in their representative character.

2. The result of the allegations is, that the plaintiff's tes-

tator entered into a contract to convey the title to certain slaves to the defendant's intestate, if a certain sum of money was paid him at a certain time—that this money was tendered by the defendants, as administrators, to the plaintiff as executor—that it was refused by him—and that this refusal had the effect to destroy his title as executor to the slaves, as well as to vest them in the defendants as administrators of their intestate. The legal question presented is, whether the defendants by this act of tender are to be held responsible in their individual capacity for the money which the plaintiff then refused to accept, but which he subsequently demanded.

There is no question that the effect of the tender was to re-vest the title to the slaves agreed to be conveyed on the payment of the specified sum at the appointed time. This is the one of the points decided in *Sewall v. Henry*, 9 Ala. Rep. 24. The consequence of the reinvesting of the title is, that the plaintiff by the same act became invested with the title to the money. Thus, in *Lamb v. Lathrop*, 13 Wend. 95, there had been a contract to deliver specific articles, and although the court considered the contract was at an end when the articles were tendered, yet they held the effect of the tender and refusal was to create the relation of bailor and bailee between the parties. By the tender in this case the money which previously belonged to the estate of Smith became the property of the estate of Gordon, and the defendants, after the tender, held it, not in their capacity of administrators of Smith, but as individual bailees of the plaintiff as executor of Gordon. In this view it seems clear the action is sustainable against the defendants as individual bailees of the money, and that as such they are responsible to the executor of Gordon.

Judgment reversed and cause remanded.

PURYEAR v. PURYEAR.

1. When a husband permits the wife to place the proceeds of the hire of a slave, out at loan for her own use, which after his death, was paid to her by the borrower, the representative of the husband cannot recover it from her. But the husband could not make such a gift to the prejudice of creditors, either during his life, or to take effect after his death.

Error to the Circuit Court of Monroe.

ASSUMPSIT by the plaintiff in error, administrator *de bonis non* of Alexander B. Puryear, against the defendant in error, for money had and received, &c.

From a bill of exceptions, it appears, that the defendant, who is the widow of the plaintiff's intestate, during the lifetime of her husband, had monies in her hands, which she loaned out, to the amount of \$——, and that after the death of her husband, this money was repaid to her.

The defendant on her part produced, and read to the jury, a will, containing the following clause: "I give and bequeath to Mary F. Puryear, during her life, one negro man Davy, and if the said Mary should die without issue, it is my desire, that the said negro should return, and be equally divided amongst Louisa C. Dailey, Joseph B. Edwards, and Osborn Edwards; but if she should have a natural heir of her body, then at her death, I give and bequeath the said negro man Davy, to her heirs forever. I appoint Samuel Dailey trustee, to hold the said negro Davy for the benefit of Mary F. Puryear."

She also proved, that with the consent of her husband, she hired out the negro Davy for many years; and that part of the time, her husband hired out the slave and paid her the hire, and that the husband, during his life, acknowledged the slave to be her property—this declaration was made in reference to the will. That he recognized her right to lend the

money she had received for the hire of the negro, and to receive repayment of the same.

On this evidence, the court charged the jury, that the defendant took a separate estate in the slave, under the will, and was therefore entitled to his earnings.

Further, that if this were not so, yet if the husband recognized such estate as being in the wife, and allowed her to collect, and lend out the proceeds thereof, as her own, whatever might be the right of creditors to pursue such proceeds, the executor could not recover this fund as assets of the estate.

This was excepted to, and is, and is now assigned as error.

DARGAN, for plaintiff in error.

The will of the father of Mrs. Puryear did not give her a separate estate in the slave David. [8 Porter, 72; 2 Ala. Rep. 152.

A contract between husband and wife is void at law. [4 Kent, 129; 4 Dana, 142; also, 1 Black. Com., title Husband and Wife; 10 Peters, 583.]

PECK, contra, cited the case of McGrath v. The Adm'rs of Robertson, 1 Desau. 445; Smilie v. Reynolds, et al. Adm'rs, &c., 2 Desau. 66; Clancy's Rights of Married Women, 277, 278; Livingston v. Livingston, 2 J. Ch. Rep. 537.

If it be conceded that the husband, during his life, might have asserted his right to this money, yet as he did not do so, the executor cannot do it, unless it be necessary for the payment of debts. [2 Story Com. Eq. § 1375.]

ORMOND, J.—The first charge of the court cannot be supported. There is nothing in the bequest, from which it can be inferred, the husband was to have no dominion or control, over the life estate of his wife, in the slave; she cannot therefore have a separate estate in it. This has been repeatedly adjudged by this court, and especially in the case of Cook v. Kennerly, at this term, where all the decisions of this court, upon this subject, are considered.

We are then to consider, whether the facts shown upon the record, establishing that the husband permitted his wife

to take the hire of the slave, during the coverture, authorizes her to hold it against the executor of the husband.

The husband and wife, being in legal estimation but one person, the former cannot make a gift, or conveyance of property to her, which she can enforce at law; though a court of equity, when there is sufficient consideration for the agreement, may, and generally does give effect to it. But if the husband makes an actual gift of money to the wife, which she retains until after his death, though he could have reclaimed it in his lifetime, and although it would certainly be liable to the payment of his debts, we think the personal representative cannot recover it from her.

This principle appears to be settled in *Hastings v. Douglass*, 3 Croke Charles, 343. The question arose in that case, upon a devise made by a husband, of his wife's jewels, giving her the use of them during her widowhood, with remainder to his daughter. Berkley, and Jones, Justices, argued, that the act of the husband during his life, by which the wife was permitted to use the jewels to deck her person, was in law a gift, and although he might have disposed of them in his lifetime, he could not make such disposition by will. Croke, and Richardson, maintained, that the husband could dispose of them by will, as well as by any act during his life; but the inference from the whole case is, that in the absence of any such disposition by the husband, the wife would be entitled to them after the husband's death.

It appears now to be settled, that a gift of jewels to a married woman, by a stranger, will be considered as being given to her separate use, and that if given to her by the husband, she may hold them against every one, but the creditors of the husband. [*Ridout v. Lord Plymouth*, 2 Atk. 104; *Graham v. Lord Londonderry*, 3 Ib. 393; *Tipping v. Tipping*, 1 P. Will. 729.

So it has also been held, that where the husband permits the wife to retain the excess, over the sum allowed for the expenses of the family, by her thrift and management, she will be entitled to hold it against his personal representative: and where she had lent a portion of the money thus saved to the husband, was permitted to come in as a creditor, after his death. [*Slanning v. Style*, 3 P. Will. 337.] The Lord

Chancellor in this case observed, "that it was the strongest proof of the husband's consent, that the wife should have a separate property in the money arising by these savings, in that he had applied to her, and prevailed with her, to lend him this sum, in which case he did not lay claim to it as his own, but submitted to borrow it as her money."

This case is quite as strong in favor of the wife, as any of those cited. The husband in this case doubtless considered that the intention of the testator was to give the wife a separate estate in the slave, and therefore abstained, not only from appropriating to himself the services of the slave, but to place the matter beyond all doubt, and to prevent all controversy about the right of the wife, by his own act permitted the wife to place the proceeds of the hire of the slave upon loan for her own use, and benefit. He might doubtless have revoked the consent thus given at any time during his life; it is equally clear he could not make such a gift to the prejudice of his creditors, either during his life, or to take effect after his death. Whether he could dispose of it by will, we are not now called on to decide, though it would seem by analogy to the right of the wife to her paraphernal or *dotal* property after her husband's death, that he could not; but that the personal representative of the husband could not assert a claim against the wife, in such a case as this, is we think quite clear, both on principle and authority.

We can perceive no reason whatever, why the wife, in cases like this, should not be protected in the enjoyment of the property by a court of law. If she were compelled to sue the personal representative, as for a debt due from her husband, possibly she would have to resort to a court of equity; but being in possession of the fund, and having the right to retain it, she has both the legal and equitable title to it, and may doubtless defend that right in a court of law. The acknowledged principle, that where the evidence of a debt is in the name of a married woman, the husband may join his wife with him in the suit, and that if he does, it will survive to her, if he dies pending the suit, is entirely analogous to this case, and shows, that after the decease of the husband, without reducing the money to his possession, the legal title to it is vested in the wife. The facts of this case are, that the

husband himself in some instances, and the wife by his permission in others, hired out the slave, and placed the money out on loan for the wife's benefit, and that the money so lent has been paid to her since the husband's death. The money, in point of fact, since the loan for the benefit of the wife, has never been reduced by the husband to his possession—and the placing it out on loan, in the wife's name, and for her benefit, is surely quite as strong evidence of the intent on the part of the husband that the wife should have an interest in it, as would be the commencement of a suit, in the joint name of husband and wife, on a note made to the wife during coverture. [Morris v. Booth and wife, 8 Ala. 907; Phillis-kirk v. Pluckwell, 2 M. & S. 393; Burrough v. Moss, 10 B. & C. 558.

Although the court incorrectly charged the jury, upon the effect of the will, no injury was done to the plaintiff, as upon the whole case, it is clear he is not entitled to recover; and the case will not be reversed for an error, which could work no prejudice.

Judgment affirmed.

McCASKLE v. AMARINE.

1. The hand writing of a justice of the peace, to an execution issued by him, may be proved by a third person, without calling the justice himself.
2. A deed is not properly recorded upon the affidavit of the subscribing witnesses, "that they acknowledged their signatures to this deed."
3. The possession of land under a claim of right, is *prima facie* such an interest as is subject to levy and sale, although the possession may not have continued such a length of time as to bar the right of entry.
4. It is no objection to the validity of a deed, that it is not recorded, except as to creditors, and subsequent purchasers. The notice of title given by possession, is equivalent to the constructive notice afforded by registration of the deed.

5. When a suit is brought against several persons, as tenants of the same lands, and A. is "admitted to defend as landlord, for each, and all of said original defendants," and pleads not guilty, it is in effect the same, as if he had instituted the suit himself, and he cannot therefore object that a judgment is rendered generally for the damages, without ascertaining the value of the rent of each tenant, *Quere?* can a joint action be maintained, if objected to, against several persons occupying separate parcels of the land.
6. The possession of a fraudulent vendee cannot be deemed adverse, as against creditors and purchasers from the vendor, where the subsequent purchase was made under judicial process; and the possession of the tenants of the fraudulent vendee, must be considered as his possession.
7. A vendee claiming to have purchased land by delivering up the note of the vendor, must, as against the existing creditors of the vendor, prove that the note evidenced a real debt.
8. The mere fact, that the entire consideration recited in a deed has not been paid, or that it is not a full equivalent for the property conveyed, does not *per se* make the deed void, though it may cast suspicion over the transaction, and authorize a verdict against it.

Writ of Error to the Circuit Court of Randolph.

THIS was an action of trespass, at the suit of the defendant in error, brought as well to try titles to the east half of section six in township seventeen, and range twelve east in the Coosa land district, as to recover damages for its occupation. The cause was tried by a jury, who returned a verdict for plaintiff, assessing his damages at ninety-five dollars.

From a bill of exceptions sealed at the defendant's instance, it appears that the plaintiff adduced the following evidence, viz: 1. A deed from the sheriff of Randolph to Smith, Culbreath, and Abel, which deed bears date the fourth day of July, 1842, and recites sundry writs of *venditioni exponas*, under which the lands in question were sold, its advertisement, sale, and purchase, by the grantees in the deed. The recitals of the deed, as it respects the levy, advertisement, and sale was proved, and the land was levied on and sold as the property of George McCaskle. 2. At the time of, and long before the sale above stated, plaintiff was a judgment creditor of Geo. McCaskle, and as such redeemed the land from the purchasers at sheriff's sale; to prove which latter fact the plaintiff read to the jury a deed from the purchasers

under the writ of *vend. ex.* This deed bears date the 12th May, 1843; but neither it, nor the preceding one, appears to have been recorded. 3. The writs under which the land was sold were issued on orders of sale, founded on the levies of executions issued by a justice of the peace on sundry judgments rendered by him. These judgments were rendered in May, 1841, levies made and returned to the spring term of the circuit court of Randolph, in 1842, when the orders of sale were made. In offering the proceedings before the justice, the plaintiff was permitted to prove his hand writing by the constable who levied the executions, and was well acquainted with it; and to this the defendant excepted. 4. Plaintiff then proved that John McCaskle resided on the land for eight years previous to the trial, and still continued to live on it. Previous to 1841, he made valuable improvements; the yearly value of the rents and profits was shown. 5. Geo. McCaskle, Willis Bennett, and Peter Bennett occupied separate houses on the land sued for, at the commencement of this action; and no one else was in possession: *Further*, that before this suit was brought, plaintiff demanded of them the possession, which they refused to yield up.

The defendant on his part, offered the following evidence, viz: 1. A deed bearing date in June, 1841, by which Geo. McCaskle, in consideration of \$700, conveyed the land in controversy to Reuben McCaskle. This deed purports to have been irregularly proved by the subscribing witnesses before the justice of the peace, who certified the probate; and thereupon the same was recorded in the office of the clerk of the circuit court of Randolph. 2. The subscribing witnesses testified that the grantee of this last deed, when it was made and delivered, surrendered to the grantor a note which he held against the latter for \$300, and in addition gave the grantor his note for the like sum—both parties stating at the time that these notes were given to the grantor in consideration of the purchase. The witnesses did not see any money paid. 3. By a law in force in Randolph county in 1841, the clerk of the circuit court was authorized to record deeds, yet it was ruled by the court that the deed was not properly recorded; and thereupon the defendant excepted. 4. An agreement by which a lease was made by the defendant to

Willis and Peter Bennett, for land that they may clear on the premises—bearing date in October, 1842, and continuing seven years, from December 1843: also, a lease by the defendant to George McCaskle and John Keller of the plantation, houses, &c. on the land during the year 1842.

It was further shown on the part of the plaintiff—1. That Geo. McCaskle, at the time he made the deed to the defendant was much in debt; that the latter had no visible means but a horse—at times taught a school—sometimes was intemperate in his habits—was the brother of his vendor—had never resided on the land, and had no fixed place of residence. 2. George McCaskle was forty-five or fifty years of age, with a family, and when the deed to his brother bears date, he had no other property but the land in question. 3. Geo. McCaskle, Willis and Peter Bennett had occupied separate portions of the land as tenants under the defendant, ever since the date of the deed to the plaintiff—the defendant frequently visiting his brother. 4. The deed from G. McCaskle to the defendant was signed when no one was present but the parties to it and the subscribing witnesses, though it was written some days before it was executed. 5. The defendant, when he received the deed from his brother was about fifty years of age—unmarried, without family of any kind. This evidence was objected to, but the objection was overruled and the defendant excepted.

The defendant prayed the court to charge the jury as follows: 1. That the plaintiff had not made out a sufficient title to the land sued for to entitle him to recover, unless he had shown a paper title in Geo. McCaskle, or twenty years adverse possession by him. 2. That the two deeds adduced by the plaintiff, if not recorded, are inoperative to entitle him to recover. Both these charges were denied—the court saying that it was unimportant whether or not the deeds were recorded.

The jury were also charged as follows: 1. That as Reuben McCaskle had been made a defendant to the action as the landlord of his brother, and Willis and Peter Bennett, if they were satisfied from the evidence that the title to the premises was in the plaintiff at the commencement of this action, then they should find a verdict against the defendant

for the lands, and the damages sustained by the plaintiff since the institution of the suit, by the several occupation of these tenants. 2. If the sale and conveyance from Geo. McCaskle to the defendant was fraudulent, made with a view to delay, hinder, and defraud the creditors of the former, then although the land may have been in the actual possession of the defendants tenants, under leases as shown by the evidence, before and at the time of the plaintiff's purchase, the plaintiff was entitled to recover. 3. If the jury were satisfied, that when the deed from Geo. McCaskle to defendant was executed, the latter gave up to the former a note purporting to have been made by him (George) for \$300; and at the same time made and delivered to him his own note for the same sum, these facts did not prove that a consideration had passed from the defendant to his vendor. To the refusal to charge as prayed, and to the charges given, the defendant excepted.

L. E. PARSONS and J. FALKNER, for the plaintiff in error, argued all the questions raised by the bill of exceptions, and cited *Morgan v. Morgan*, et al. 3 Stew. Rep. 383; *Powell v. Allred*, 11 Ala. R. 318; *Fipps v. McGehee*, 5 Port. R. 413; 4 Ala. R. 469; *Rhea, Conner & Co. v. Hughes*, 1 Ala. R. 219; *Smith, et al. v. Hogan*, 4 Ala. Rep. 93; *Doe ex dem. Davis v. McKinney*, 5 Id. 730; *Tillotson v. Doe ex dem. Kennedy*, Id. 407; *Badger v. Lyon*, 7 Ala. R. 503; *Carloss, use, &c. v. Ansley*, 9 Id. 900; *Wheaton v. Sexton*, 4 Wheat. Rep. 503.

S. F. RICE, for the defendant in error, cited *Paris v. Burger*, 5 N. H. Rep. 325; *Jones v. The Planters' Bank*, Id. 619; *Jackson v. Merritt*, 11 Wend. Rep. 46; *Fipps v. McGehee*, 5 Port. Rep. 413; *McCain v. Wood*, 4 Ala. Rep. 258; *Branch Bank at Decatur v. Kinsey*, 5 Id. 9; *Horton v. Smith*, 8 Id. 73; *Carloss v. Ansley*, Id. 900; *Daniel v. Sorrells*, 9 Id. 436.

COLLIER, C. J.—Without stopping to inquire whether it was necessary for the plaintiff to produce and prove the proceedings before the justice of the peace, or whether the or-

ders of sale having been made upon their inspection, was not conclusive of their regularity, we would remark, that if such proof was essential, we can discover no objection to the competency of the constable. This witness affirms that he was well acquainted with the handwriting of the justice; and if it was more convenient to obtain his testimony, or the plaintiff preferred relying on it, to calling on the justice to prove or admit his writing, we cannot conceive that any rule of law would be violated. The evidence of the justice might perhaps be more satisfactory and convincing, but it would not be of a higher grade, and could not consequently be rejected under the influence of the rule which requires the best evidence attainable to be adduced.

The certificate upon which the deed from George McCaskle to the defendant was admitted to record, merely affirms that the subscribing witnesses personally came before the justice of the peace, and being duly sworn, deposed "that they acknowledged their signature to this deed. Now, the statute requires where a deed is proved by the subscribing witnesses, that they shall declare on oath, that they saw the grantor sign, seal and deliver the same to the grantee, and that they subscribed their names as a witness thereto in the presence of the grantor, &c. [Clay's Dig. 151-153, § 1-7.] It is perfectly clear that the certificate does not at all conform to the directions of the act, and the registration cannot be regarded an official act of the clerk, so as to operate a constructive notice of the contents of the deed to those whose interests it may affect.

It was not indispensable to the plaintiff's right to recover, that he should have adduced documentary evidence of a title in the defendant in the executions under which the sheriff sold the land, or that the latter had had twenty years uninterrupted adverse possession. We have repeatedly held, that where a party is in possession of land under a claim of right, he has *prima facie* such an interest as is subject to levy and sale under a *feri facias*; although the possession may not have continued for such a length of time as to bar a right of entry. Actions of ejectment and of a kindred character have frequently been maintained upon proof of possession for a period short of twenty years. These decisions rest upon the

ground that the defendant in execution, or the plaintiff in such action, had a *legal title*, though it may have been incomplete in itself, or imperfectly evidenced.

It is not indispensable to the validity of a deed conveying lands, that it should be recorded. But if it is not registered within the time prescribed by our statutes, it is only invalid and inoperative against creditors and subsequent purchasers, &c. [Clay's Dig. 154, § 18; 256, § 8.] The defendant does not come within either of these classes; as to him therefore, it is unimportant whether the deed under which the plaintiff deduces a title was ever recorded. If the purchase under which he claims was *bona fide*, and the plaintiff had constructive notice of it, either by the registration of his deed or the occupation of his tenants, (which may be regarded as equivalent,) the subsequent sale by the sheriff through which the plaintiff claims cannot affect him.

It might perhaps have been questioned whether, if George McCaskle and Willis and Peter Bennett occupied separate parcels of the land in controversy, a joint action could be maintained against them, but that question was not raised, and it is possible the record is now in such a condition, that it cannot be made hereafter. If the tenants occupied distinct parts of the land, then the verdict against them should have been for damages severally against each, proportioned to the value of the parts they respectively occupied. The circuit court admitted the defendant to defend the suit "as landlord for each and all of said original defendants," and the plea of "not guilty" was then filed, &c.; the jury found the original defendants (the alledged tenants) not guilty and the defendant guilty—assessing the damages against him, &c. This proceeding may not be technically correct in every particular, yet as the landlord upon his own motion was admitted as a defendant to defend for his tenants, the case may be considered as if he was a party to the writ. This being so, he could not if the suit had been thus instituted, have objected that his tenants were discharged by the verdict, and that he had been charged with the rents for the premises occupied by them. As he was instrumental in keeping the plaintiff out of possession by putting others in, he should make good to the plaintiff, the loss resulting from

his ouster, though the tenants might be liable to him for rent ; and we think it is not material as it respects the consequences, whether he is made a party under original process, or comes in of his own accord. If the landlord who defends unsuccessfully is liable for the damages accruing after "the commencement of the suit," we can conceive of no objection to the verdict because it is for an aggregate sum, instead of estimating severally the value of the rents for the part occupied by each tenant.

If the sale by George McCaskle was fraudulent, and intended to delay, hinder and defraud his creditors, the fact that the defendant, his vendee, had leased the land to other persons who were in the actual possession when the sale was made by the sheriff under the writs of *venditioni exponas*, or when the plaintiff redeemed the land from the purchasers at that sale, as authorised by the statute, cannot impair the plaintiff's title. The possession of a fraudulent vendee cannot under such circumstances be deemed adverse as against creditors and purchasers, where the subsequent sale is made under judicial process : and the possession of his tenants must be regarded as in subordination to his title.

The judgments before the justice of the peace under which the levies and subsequent orders of sale were made, were rendered before the execution of the deed from George McCaskle to the defendant, and as against the plaintiffs in those judgments, and the purchasers deducing a title to the land through the orders of sale, it devolved upon the defendant to show that the note of his vendor which was delivered up, evidenced a real debt. Without the aid of such extrinsic evidence, no influence can be accorded to it against a pre-existing creditor of the vendor. If the law were otherwise, it would be easy to simulate a debt, manufacture the ostensible proof of it as occasion required, and thus place at defiance the creditors of a debtor who did not feel it a paramount duty to pay his debts. But it is unnecessary to attempt to support this view by reasoning, for it rests upon unquestionable authority.

In respect to the note for three hundred dollars, which was made by the defendant and handed to his vendor at the time the deed was executed, there was nothing to impugn the con-

sideration thus far. It cannot be assumed as a *legal conclusion*, because the vendor's note which was delivered to him was not shown to indicate a real indebtedness, that the vendee's was merely simulated, and intended to put a false phase upon the transaction. The mere fact that the entire consideration recited in a deed has not been paid, or that it is not a full equivalent for the property conveyed, does not *per se* make the deed void, although they might in the opinion of a jury throw suspicion over its fairness, and under some circumstances authorise a verdict against its validity. In the case at bar, the court, instead of passing upon the *bona fides* of the sale and conveyance from George McCaskle to the defendant, and declaring that it was not supported by a consideration, should have laid down the law, and the jury should have determined the questions of fact and the intention of those parties. For the error in the last charge given, the judgment of the circuit court is reversed, and the cause remanded.

SCOTT, SLOUGH & Co. v. STALLSWORTH.

1. In an issue between the transferee of a debt admitted as due to the debtor and the attaching creditor, the court may require the transferee to aver the validity of the transfer, and it is not error to refuse to compel the creditor to aver that the debt is subject to his process.
2. Under the trial of such an issue, the debtor, under the act of 1845, is not a competent witness.
3. The answer of the garnishee, and the papers in the cause, cannot be looked to as evidence on the trial of this issue.

Writ of Error to the Circuit Court of Mobile.

STALLSWORTH sued one Thom before a justice, and there had judgment; afterwards he summoned Huntington &

Cleveland as garnishees, but they answered, that although they were indebted to Thom, yet they had been notified by Scott, Slough & Co. that Thom had assigned the debt to them. Scott, Slough & Co. were thereupon summoned as transferees to contest the plaintiff's claim. The justice gave judgment in favor of Stallsworth, and Scott, Slough & Co. appealed to the county court. When the issue was about to be made, the transferees insisted Stallsworth should alledge and they deny that the money in the hands of Scott, Slough & Co. was subject to the judgment. The court refused to direct the issue thus, and directed that Scott, Slough & Co. should assert that Thom's transfer of H. & C's indebtedness to them was valid. This was excepted to, but the issue formed as directed by the court. This in the judgment entry is stated as being formed by consent of parties.

At the trial, the transferees offered the deposition of Thom, the defendant in execution, as evidence to prove the validity of the transfer, but the court excluded it on the ground that Thom was incompetent, under the statute, as a witness.

The court charged the jury, that the only question was, the validity of the transfer made by Thom to Scott, Slough & Co., and the jury could not look to the answer of the garnishee, nor to the papers in the original suit of Stallsworth v. Thom as evidence for any purpose on this issue.

The transferees excepted to the several rulings of the court against them, and here assign the same as error.

WM. G. JONES, for the plaintiff in error, insisted—

1. The court forced the plaintiffs to join in an improper issue. Stallsworth was the actor, he should have made the allegation, and the defendant denied it. The form of issue prescribed by the court was injurious and oppressive to the plaintiff in error. It shifted the *onus probandi* from Stallsworth, on whom it properly lay, and threw it on Scott, Slough & Co. It made them hold the affirmative, and required them to prove the validity of the assignment to them. That the issue was improperly made up, see Goodwin v. Brooks, et al. 6 Ala. Rep. 836.

2. The court erred in excluding the deposition of Thom. The act of 25th January, 1845, (see Acts, p. 136,) does not in terms apply to this case, and being in derogation of common law, and tending to exclude evidence from the jury, it is submitted that the court ought not to extend its application by implication.

The court erred in charging the jury that they could not look to the papers in the case as evidence for any purpose. It was necessary the jury should do so to see the subject matter in controversy, and to identify it. The jury is always allowed to take the writ, declaration, &c., and look to them. Without this they cannot see the identity of the subject matter involved in the issue, nor the proper application of the evidence.

STEWART, contra.

GOLDTHWAITE, J.—1. Upon the first point made by the plaintiffs in error, we think the decision made by us in *Camp v. Hatter*, 11 Ala. R. 151, is conclusive. We then held, that in an issue between the transferee of the debt admitted to be due by the garnishee, it was incumbent on the transferee to show the transfer of the debt to him previous to service of process on the garnishee, and that it was proper for the court to require this question to be presented by the issue. The effect of this decision is, that the validity of the transfer must be alledged by the transferee. It is supposed in argument, that cases may arise in which the debt admitted by the garnishee may in point of fact have been a debt due to the transferee, instead of the defendant in attachment, or execution, and thus, in such cases, the transferee would be deprived of the benefit of his oath in denying the indebtedness to the defendant in execution. The answer to this is, that under the supposed circumstances, the garnishee would not be authorized to admit indebtedness to the debtor, and if he did so wrongfully, he could never resist the claim of the rightful creditor. When, however, the garnishee admits the existence of a debt, which once was payable to the debtor, there is no peculiar hardship in requiring him who claims through a transfer, from showing its validity. We think

there was no error in requiring the issue to be formed as it was.

2. The facts of this case do not, it is true, bring it within the precise terms of the act of 1845, as the proceeding before us is not technically *a trial of the right of property*, although it is so in effect, *quoad* the debt attached. We have endeavored to show, in our previous decisions on this act, that its object is to exclude the *defendant in execution* from being a witness on the ground of policy, and not upon the ground of interest. [Brumby v. Langdon, 10 Ala. R. 747; Carville v. Stout, Ib. 796.] The object of the enactment being to exclude the debtor as a witness, in a contest between him and the creditor, when the contest is with respect to the condemnation of the property seized, it is impossible to say there is any substantial difference between the seizure of debt and a personal chattel. In either case the means are provided for the assertion of the claim of a third person, and although in the one instance, the claim is called a trial of the right of property, and in the other garnishment, we think the last is equally within the mischief intended to be eradicated by the statute. In our judgment the deposition of the witness was properly rejected.

3. The only other point to be examined, is that arising out of the charge of the court. It may be, and doubtless is true, as argued by the plaintiffs in error, that the papers and pleadings in a suit are always evidence of the facts admitted by them, but it cannot be assumed they are so to prove the precise matter in issue. Thus a plea of payment unaccompanied by one denying the cause of action, might properly be considered as evidence of the admission of the debt, but certainly could have no effect to prove the affirmative of the issue of non-assumpsit. Whatever weight the answer of the garnishee was entitled to in his own case, neither that or the other papers were evidence to prove the validity of the assignment by the debtor to those claiming to be his transferees. [Wyatt v. Lockhart, 9 Ala. R. 91.]

We are unable to see any error in the record. Judgment affirmed.

NEWMAN v. JAMES & NEWMAN.

1. A conveyance of slaves by deed, to a married woman, "to her and her heirs, to have and to hold the same, to and for her use, benefit and right, and of the heirs aforesaid, without let, hindrance, or molestation, whatever," is a conveyance of the property to her sole and separate use.
2. When property is conveyed absolutely, to a married woman, by a stranger, the statute of frauds has no application, in a contest between the wife and the creditors of the husband; it is therefore unimportant, whether the instrument is, or is not recorded.
3. When a gift of slaves is made by deed, the delivery of the deed is sufficient, without a delivery of the property.
4. A denial by a defendant, upon information and belief, not founded on the personal knowledge of the defendant, will not overturn the positive testimony of one witness, sustaining the allegations of the bill.

Error to the Chancery Court of Monroe.

THE bill, which was filed by the plaintiff in error, alleges that one William Hollinger, on the 22d December, 1843, being the owner of certain slaves, by deed of that date, made a gift of them to her, for her sole and separate use, and intended so to express it in the deed, and so directed the deed to be drawn, but which was unskilfully drawn, and because the intentions of said Hollinger were not set forth, does not clearly express the intention of Hollinger, to give her a separate estate; and avers that no consideration passed from her husband to Hollinger, to induce him to make the gift.

That afterwards, on the 30th July, 1845, Hollinger having discovered the error, and mistake in the deed, and for the purpose of correcting it, made another deed of the property to her. Both deeds are made exhibits to the bill.

That at the spring term, 1844, Robert D. James recovered a judgment against Alger Newman, her husband, for \$554 33 debt, and \$406 93 damages, and on the 18th July, 1845, an alias execution issued on the judgment, was placed in the hands of the sheriff of Monroe—that he has levied on,

and advertised the property for sale, &c. The prayer of the bill is for a reformation of the first deed, for an injunction, &c.

James answered the bill, and denied that the slaves conveyed by the deeds ever were the property of Hollinger, but were the property of Newman—that the slaves were not in the possession of Hollinger at the time of the conveyance, and were never delivered to the complainant—and charges that the deeds are fraudulent and void in fact, and for want of registration.

For the testimony see the opinion of the court. The Chancellor dismissed the bill, which is the matter now assigned for error.

LESLIE, for plaintiff in error.

A court of equity will correct a mistake in a deed, when it does not contain the true intent of the party making it. [1 Story on Eq. 128, § 115; Ib. 151, § 136.]

When property is given to a *feme covert* by deed, as “to and for her use, benefit, and right, without let, hindrance, or molestation whatever,” it will be considered for her sole and separate use. [Clancy’s Rights, &c. 262, 267; O’Neal, et al. v. Teague, 8 Ala. R. 345.]

The statute of frauds does not require a deed to a *feme covert* for her sole and separate use to be recorded, where the property goes into the possession of the donee. [Swift v. Fitzhugh, 9 Porter, 58; Thomas & Howard v. Davis, 6 Ala. Rep. 113; Catterlin v. Hardy, et al. 10 Ala. R. 511.]

BLOUNT, contra.

1. Exhibit A., being a deed from William Hollinger to Elizabeth Newman is void for want of registration. [Myers v. Peek’s Adm’rs, 2 Ala. R. 648; Statute of Frauds, Clay’s Dig. 254.]

2. It is void because intended to hinder and delay creditors—it was intended to prevent the defendant from collecting his debt sued for on 2d January, 1842; the deed bears date

22d December, 1843, nearly two years afterwards. [Myers v. Peek's Adm'rs, 2 Ala. 648.]

3. There was no delivery of the property or of the deed to the complainant—it is indispensable to the validity of a gift *inter vivos*, there should be a delivery of the property accompanying the gift. [Sewell v. Glidden, 1 Ala. Rep. 52; Oden v. Stubblefield, 4 Ib. 40.]

4. Whatley, one of the witnesses of complainant shows that Alger Newman has always been in the possession of the negroes. Peebles, the only other witness, has known Hollinger for eighteen years, and has never seen said slaves in Hollinger's possession. The answer avers that the negroes have always been in Newman's possession.

5. The exhibit B. conveying a sole and separate estate to complainant, is fraudulent and void as to defendant's debt—the alias execution created a lien upon the property on 18th July, 1845, and exhibit B. bears date 30th July, 1845.

6. If it was not Hollinger's property, it is a matter of no consequence whose property it was—so far as Mrs. Newman is concerned. The levy of the defendant's execution on the slaves, as the property of Newman, is good until a better title is shown.

7. The complainant has entirely failed in proving property, or possession, in Hollinger at the time of the execution of the deed A., or at any subsequent time—but her witnesses have proved the property in the possession of Alger Newman.

ORMOND, J.—The first deed made by Hollinger, conveys the slaves, and other property, to Mrs. Newman, “to her and her heirs, to have and to hold the same, to and for her use, benefit, and right, and of the heirs aforesaid, without let, hindrance, or molestation whatever.” In our judgment, these words clearly indicate the intention, to create a separate estate in the wife. The most appropriate language to employ, in the creation of such an estate, is “to her sole and separate use;” these have an established technical meaning, indicating with legal certainty, the character of the es-

tate intended to be created. But it is well settled, that no particular phraseology is necessary; it is sufficient, if it appear manifestly that the intent was to secure it to the use of the wife, in such a mode as to be inconsistent with the enjoyment of the gift by the husband, or with the exercise of dominion over it by him.

Thus it has been held, that a gift to trustees, for a married woman, to which was added, "my said trustees shall not be troubled to see to the application of any sum, or sums, paid to the said Sophia, but her receipt in writing shall be sufficient," were held to be sufficient, to indicate an intent to create a separate estate in the wife. So in *Hartley v. Hurle*, a direction to pay a legacy "into the proper hands" of a married woman, was held to give her a separate estate. [5 Ves. 541.] Many other cases might be cited, some of which appear to be of doubtful authority, but the clear result of the authorities is, that when it is evident from the language employed in the creation of the estate, that the husband should not enjoy the property, or exercise any dominion over it, his marital rights are excluded, and the wife will take a separate estate. It is declared to be for her use, benefit, and right, and although these words standing alone, might not be sufficient, yet when it is added, she was to hold this property, "without let, hindrance, or molestation whatever," it is impossible, we think, to doubt the intention was, that the husband should exercise no control, or dominion over it. To permit him, or a creditor in his name, to appropriate it to the payment of the husband's debts, would be in direct contravention of the deed. In our judgment it is a much clearer case of the creation of a separate estate, than either of those cited. [Clancey on Rights, 267; *Ex parte Ray*, 1 Madd. C. 199, Am. ed. 115.]

This renders it unnecessary to consider, the question, whether the case presented is one requiring the deed to be reformed, so as to make it speak the intent of the donor.

We do not perceive, that the 2d section of the statute of frauds, requiring conveyances of personal property to be recorded, unless the possession remains with the donee, has any application to this case. The design of the statute was, to subject the property in such a case, to the payment of the debts of the donor, and doubtless in this case, if the posses-

sion of the property was retained by the donor, without registration it would be liable to the payment of his debts, or in the language of the act, would be taken to be fraudulent. But that is not the predicament of the case. The attempt is, to make the slaves responsible for the debts of the husband of the donee. The case of *Myers v. Peek*, 2 Ala. 655, was determined upon the last clause of the 2d section of the statute, requiring the registration of deeds, where a loan had been made, or a reservation, or limitation retained by the grantor, the possession being with the loanee, or grantee, and has no bearing upon such a case as the present. See, also, *Oden v. Stubblefield*, 4 Id. 40, and *Thomas & Howard v. Davis*, 6 Id. 121. It is manifest, these decisions have no application here. This is not the case of a loan, or reservation of an interest by the donor, but is an absolute gift to a married woman, and the statute of frauds has no application, in a contest between the wife and the creditors of the husband. [*Swift v. Fitzhugh*, 9 Porter, 39, and *O'Neil, Michaux, &c. v. Teague*, 8 Ala. 349.]

If the slaves conveyed by this deed to Mrs. Newman, belonged to Hollinger at the time the deed was made, it was a valid conveyance, although there was no delivery of the slaves to her. An actual delivery is necessary to the consummation of a pure gift at common law, but where the gift is manifested by deed, the delivery of the deed is an equivalent act, and consummates the gift. [*McCutchen v. McCutchen*, 9 Porter, 650.] It is supposed there is no proof the first deed was delivered. The fact of delivery is usually inferred from circumstances, and is in this case conclusively established, although the [donee was not present at the execution of the deed. The donor himself admits the full execution of the deed, and that it is binding on him, and we are unable to perceive, what interest any one who does not claim through him, as creditor, or purchaser, has in controverting this fact. If the deed is void for want of a delivery to the donee, the creditors of the husband of the donee can claim no benefit from it, for the result would be, that the property is still in Hollinger, the donor. And this brings us to what is really the only question of any difficulty presented by the

record—were these slaves, at the time of the conveyance, the property of Hollinger, or were they, as contended, the property of Alger Newman, the husband.

This is a matter of fact, to be determined from the evidence, and involves the question of fraud. The donor has been examined as a witness, and he proves, that the slaves belonged to him, when he conveyed them to the wife of Newman. He states, that the slaves once belonged to Newman, but that he purchased them at Monroeville, at sheriff's sale. That Newman is an improvident man, and he conveyed them to Mrs. Newman, from considerations of blood, and affection, she being his cousin, and a cripple, and both being of the Creek tribe of Indians. That at the time of the conveyance, the slaves were not present, being on his plantation. That Newman, for six or seven years previously, had the charge of all his slaves, but at the time of the conveyance was out of the State.

The defendant examined no witnesses, and it is evident if this witness is believed, the slaves were his, and he had the right to give them to whoever he pleased. There can be no doubt of his competency, as he has no legal interest in the question. Nor do we see any thing in the fact, that it was a donation, which should discredit his testimony. It appears from the testimony of the other witnesses, that he is wealthy, and that he was expected to die on the day the deed was executed; that he declared he had long meditated making this conveyance, and that it had been delayed too long.

We do not see any material variance between this testimony and the evidence of Whatley. The latter states, he does not know to whom the slaves belonged at the time of the conveyance, except the boy Ben, who was purchased by Hollinger of the witness, in 1840, and to whom he executed a bill of sale—when he first knew the slaves they were in the possession of Newman, but whether they were in fact in his possession, or merely under his control as the overseer of Hollinger, he does not know.

We do not think the omission of Hollinger to state that he purchased the boy Ben from Whatley, impugns his veracity. No conceivable motive could exist for the suppression of this

fact ; and the general statement, that he purchased the slaves at a sheriff's sale of Newman's property, may reasonably be referred to the five other slaves, Milley and her children, as he might well suppose, his right to Ben, who never had belonged to Newman, would not be controverted.

As to the proof by Whatly, of the possession of the slaves by Newman, it is too indefinite to be of much value as evidence. He may refer to a period anterior to the sheriff's sale, and if he speaks of a subsequent time, he admits he does not know, whether Newman asserted title, or whether his apparent possession was any thing more than the control of an overseer. Be its effect however what it may, it is certainly not inconsistent with the testimony of Hollinger. There is indeed, no testimony establishing that Newman was ever in possession of these slaves, since the date of the deed ; but if that fact were incontestably proved, it would not be inconsistent with his wife's right of property, unless possibly he was separated from his wife, and asserted a title adverse to the deed, under which she claimed title. [Lee v. Mathews, 10 Ala. 686.]

It will be seen, that the entire merits of the case turns upon the testimony of Hollinger, and in our judgment there is nothing in the testimony itself, or in the attending circumstances, calculated to show that it is not entitled to full credence. The principal fact, the purchase of the slaves, is stated to have been open, and notorious, and if it was fabricated, it is impossible to suppose it would not have been shown to be false. Nor is there any reason whatever for supposing that the purchase was made with Newman's money. The answer in reference to the *bona fides* of the transaction, is made upon information, and belief, and does not profess in its denials to be founded on the personal knowledge of the defendant—proof therefore by one witness of the facts, is sufficient, the more especially as the fact is not a secret transaction, but one which was public, and must have been generally known.

Our judgment therefore is, that the Chancellor erred in his decree dismissing the bill. The decree rendered by the

Chancellor must be reversed, and one be here entered, enjoining the respondent from collecting his judgment out of the slaves mentioned in the deed of the 22d December, 1843.

HUTCHINSON, ADM'R, v. GAMBLE.

1. When the avails of an action prosecuted by an administrator, would, if successful, be assets of the estate he represents—if unsuccessful, the estate must be charged with the costs; and if a judgment for costs is rendered against him by the court below *de bonis propriis*, it will be here rendered *de bonis intestatis*.

Writ of Error to the Circuit Court of Sumter.

THE plaintiff in error declared against the defendant in detinue for a female slave and other property, alledging his possession as administrator, the loss by him and the finding and detention by the defendant. Afterwards, the plaintiff voluntarily suffered a nonsuit, and offered to prove that the property sought to be recovered never was in his possession, and that the action was instituted in his representative character to recover property supposed to belong to his intestate's estate, and of which the defendant obtained possession subsequent to the death of the intestate, and previous to the grant of administration. But the court refused to hear the proof, and rendered a judgment against the defendant for the costs *de bonis propriis*.

R. H. SMITH, for the plaintiff in error.

S. W. INGE, for the defendant in error.

COLLIER, C. J.—In Chandler, et al. v. Shehan, 7 Ala. Rep. 251, it was said that the test to determine whether a

judgment against an administrator should be *de bonis propriis, aut intestatis*, is whether or not the money for which the action is brought, would if recovered be assets of the estate; though it was conceded that it had been held in England, that a plaintiff suing as an executor or administrator would be liable *de bonis propriis*, if the action could have been maintained in his own name. And in *Stewart, et al. v. Hood, et al.* 10 Ala. Rep. 600, it was held, that in this State when an administrator *de bonis non* sues upon a note given to the administrator in chief, in that character, for goods of the estate, he is not responsible *de bonis propriis* for costs, as he necessarily sues in his representative character. The court said it would seem that whenever an administrator may properly sue in his representative character, the costs in all cases should follow the judgment; and as that is, that the defendant be discharged of the suit of the administrator, the costs are recovered of the latter in his representative character.

In the case at bar the plaintiff, if he had been in possession of the property after the grant of administration, might perhaps have sued in his own name, yet it was not indispensable that he should have thus declared. Whatever the plaintiff would have recovered had his action been successfully prosecuted, would have been assets of the estate he represented; and being unsuccessful according to the cases cited, that estate is chargeable with the costs. The judgment is therefore reversed, and the proper judgment here rendered for the costs of the circuit court *de bonis intestatis*.

HUNTER v. O'NEIL.

1. An obligation to make a deed to certain lands when the price contracted for is paid, is in law a covenant to make a good title when the condition is performed by the purchaser.

2. When the vendor entering into such a contract becomes insolvent before the price is paid, and the purchaser shows an outstanding incumbrance created by the vendor, he will be entitled to relief in a court of equity.
3. But, unless the money is actually tendered upon condition that a title is made, the only relief is to enjoin the vendor from proceeding for the price until he gives indemnity against the outstanding incumbrance.

Writ of Error to the Court of Chancery for the 30th District.

THE case made by the bill is this: Hunter, the complainant, in the year 1836, purchased from O'Neil, the defendant, a half-quarter section of land for the price of \$456, for which he executed his note to O'Neil, payable 25th December, 1837, and O'Neil executed an instrument under seal, binding himself, his heirs, &c. to make a deed for the land as soon as the note was paid. At this time O'Neil was in affluent circumstances, but afterwards failed and became insolvent. The note was reduced by payments, but a portion of the sum remaining due, O'Neil obtained judgment in 1841 for \$219 81 debt, and \$46 38 damages. At the time of the sale of the land, it was incumbered by a mortgage from O'Neil to the Tuscumbia and Decatur Railroad Company, which yet remains in full force, and the existence of which was unknown to the complainant when he purchased and took O'Neil's bond. The prayer is for a rescission of the contract, and for further relief.

The answer admits all the allegations of the bill with regard to the purchase, except the want of knowledge asserted by the complainant of the existence of the incumbrance, as to which it asserts that the fact was known or communicated. The defendant insists the mortgage spoken of does not become absolute until the year 1848, and that he is under no obligation to give any thing more than a deed when the money is paid. He admits his actual insolvency, but submits it may not continue always, and relies on his answer as a general demurrer to the bill.

The chancellor at the hearing dismissed the bill. This is now assigned as error.

T. M. PETERS, for the plaintiff in error.

W. COOPER, contra.

GOLDTHWAITE, J.—1. The question here is, whether the obligation of the defendant to make a deed when the price for the land is paid, amounts to a covenant of warranty that he will then have a title; and if so, whether the complainant is entitled to any, and what relief, on account of the insolvency of the defendant taking place after the execution of the obligation, and previous to the payment of the price. In *Cullum v. Branch Bank at Mobile*, 4 Ala. Rep. 21, we had occasion to consider to some extent the obligations assumed by the vendor and purchaser in a sale of land. We there say the right of the purchaser to a good title is a right not growing out of the agreement of the parties, but is given by law—that courts of equity govern their proceedings by this just rule, and when an incumbrance is discovered before the execution of the conveyance, the vendor must discharge it, whether he has or has not agreed to covenant against incumbrances. A different rule obtains when the conveyance is executed; then the maxim of *caveat emptor* applies, and the remedy of the purchaser must arise entirely on the covenants of warranty, if there is no fraud in the transaction. The effect of an obligation to make title or give a deed at a future day in view of the principles just stated, may be assumed to be a covenant that the vendor will then make a good title, as it is impossible to conceive the parties were contracting—not with regard to that—but with respect to a worthless instrument, which a mere deed certainly would be, if it passed no title and contained no covenants of warranty. We are aware there are decisions which hold that an obligation to give a deed, is complied with by executing an instrument of that description without reference to the title, but it seems to us these are inconsistent with sound reason. See 4 Paige, 628; 2 John. 595; 12 Ib. 436; contra, 16 John. 267; 20 Ib. 130.

2. Taking the obligation of the defendant as a covenant that he will make the complainant a good title to the land sold him upon the payment of the note, it is evident no *legal* right arises until this condition is performed; nor would the

outstanding title in another person furnish a defence either at law or in equity, as the parties have not contracted with reference to that condition of things, and many previous decisions of this court show, that as long as possession remains with the vendee, he cannot resist an action for the price. We do not understand the complainant as controverting these positions, but as asserting the contract as one, which implies the ability of the vendor to respond in damages, if unable to perform his stipulations, and that his insolvency subsequent to the contract of sale, lets the purchaser in to resist the payment of the price and rescind the contract, which it becomes evident the vendor will not be able to perform. In *Cullum v. Branch Bank*, *supra*, when speaking of the attempt to urge a similar defence at law where the deed contained covenants of warranty and the purchaser was evicted, we said: "Such a defence, whatever may be its merits, cannot be called a failure of consideration, because without the warranty the purchaser would be remediless—if entitled to any remedy, it must be in consequence of the warranty and the subsequent insolvency of the warrantor, by which the covenant intended for the purchaser's security has become unavailable." We there determined that the circumstances referred to constituted no defence at law, but stated our impression, that the subsequent insolvency of the vendor, furnished a ground for equitable relief. In considering that subject, we said: "When the defendant accepted the covenant of warranty, this was doubtless considered as an effective security," and the vendor ought not to be permitted, when insolvent, to receive the purchase money, which he would be compelled to refund in an action on the warranty. It is true, in the case we have hitherto referred to, there was an actual eviction, but we apprehend the same principles apply when the purchaser, besides the insolvency, shows a paramount or outstanding title which may be asserted against him. In *Long v. Brown*, 4 Ala. Rep. 622, we state the principle that a court of equity will not interfere between parties to a contract when it is executory and no fraud has intervened, but will leave them to seek the redress they have stipulated for, unless there is some special ground for its interposition. Thus, chancery will interpose when the covenants of the par-

ties are independent, and the vendor cannot make or obtain the title, and is *insolvent*. The ground of interposition in such a case is to prevent the irreparable injury which must result from the payment of the purchase money to one, who cannot respond in damages for the breach of the contract on his part. In the more recent case of the Tuscumbia Railroad Co. v. Rhodes, 8 Ala. Rep. 206, we were required to consider the effect of insolvency as a distinct ground for equitable relief, and there held it sufficient to create the right in a surety to retain a debt prospectively due from him to his principal, until the latter either relieved or indemnified him against the debt for which he was responsible. We think the principles adverted to in some, and settled in other of the cases cited, sustain the complainant's right to relief of some kind, and we shall now proceed to state what we consider that relief to be.

3. It is evident the insolvency of the vendor, in itself is no ground for a rescission of the contract, inasmuch as the parties have stipulated the title should not be required until the price was paid. Doubtless if the money was tendered by this bill, and the vendor did not make a sufficient title, under the direction of the court a rescission of the contract might very properly be decreed, but then the complainant would be charged in the account with the rents and profits of the land during his occupation, if indeed it was so occupied by him; but all which he has the right to require in the present condition of the case, is to be placed as he would be by his contract if O'Neil was solvent. That is to have an indemnity against the outstanding mortgage, admitted to be in existence and created by O'Neil. The proper decree, is, that the plaintiff at law shall be enjoined until he executes a sufficient indemnity against that mortgage, and that he may, upon its removal, be allowed to proceed. The indemnity to be settled by a reference to the master.

Decree reversed and remanded, for further proceedings in conformity to this opinion.

COOK v. KENNERLY & SMITH.

1. An *ante-nuptial* contract, by which the wife, before the marriage, conveyed certain slaves, and other property to trustees in trust, "to the use of the said C. B. S., and her intended husband, J. C. K., during their natural lives, at the death of either, then to the use of the survivor during his, or her life; at the death of such survivor, then to such child, or children of the said C. B. S., and the lineal descendants of such child, or children as may be then living, to them and their heirs forever; but should there be no child, or children of the said Catherine, nor lineal descendant living at the time of the death of such survivor, then the said property to be equally divided among the next of kin of the said C., who may then be living, to them and their heirs forever. Yet the said C. may, notwithstanding her coverture, by any writing under her hand and seal, attested, &c.; or by her last will, &c., bequeath, or leave any of the aforesaid slaves, or all of the same, to her said intended husband, or any other whatsoever"—does not give the wife a separate estate in the property conveyed, but creates a joint estate in the property in the husband and wife during their lives, with remainder to the children: and after it is reduced into possession by the husband, is subject at law to the payment of his debts; a sale under execution, conveying to the purchaser the life estate of the husband, and of the wife during his life.
2. The law of South Carolina, where the deed was made, requires such instruments to be recorded, and for want of such registration, declares them void, as to creditors, but that as between the parties to the deed it shall be valid without registration. Held, that the provision in relation to creditors, had no *extra territorial* efficacy as a law, and only applied to debts created, or attempted to be enforced, in South Carolina.
3. When slaves are conveyed in trust for the use of another, he is entitled to the possession to make the use effectual, unless the deed expressly declares the *cestui que trust* is to be entitled only to the profits. The employment in the deed, of the term "in their actual possession," would not justify the trustees in withholding the possession from the *cestui que trust*.
3. The possession of the *cestui que trust*, is not within the second section of the statute of frauds. *Quere*, would it not apply to a trustee, who retained possession of the trust estate, without registration of the deed.

Error to the Circuit Court of Lauderdale.

DETINUE by the defendant in error.

From a bill of exceptions, found in the record, it appears that the plaintiff in error, as sheriff, had levied on a number of slaves, by virtue of an execution against James C. Kennerly, and that the action was commenced by the plaintiffs below, as trustees of Catherine Kennerly, wife of James C. Kennerly, and relied on a deed, made previous to the marriage, in the State of South Carolina; to which both the husband and wife were parties, the material parts of which are as follows:

This indenture, made the 15th May, 1827, between James C. Kennerly of Lexington district, physician, of the first part, Catherine B. Smith of Charleston district of the second part, and James Kennerly, Benjamin Smith, and Thomas J. Smith of the third part. Whereas, a marriage is intended to be shortly had, and solemnized, between James C. Kennerly and Catherine B. Smith; and whereas, the said Catherine is possessed of a considerable personal estate, consisting of the following slaves, to wit: Peggy, &c., &c. And is also entitled to an undivided moiety of the negroes, late the property of Francis Charlotte Smith, a deceased sister of the said Catherine, which she inherited from her father. And whereas, the said Catherine, being aware of the many pecuniary accidents and misfortunes, which occur even to the most prudent and considerate, is willing, and desirous of having the said property settled, and secured, in such manner, and to and for such uses, as shall be hereinafter mentioned, he, the said Jas. C. Kennerly, having previously, and voluntarily consented thereto, and now being privy to the same. This indenture therefore witnesseth, that for and in consideration, &c., the said Catherine B. Smith hath given, &c., to the said James Kennerly, Benjamin Smith, and Thomas J. Smith, in their actual possession, all the negro slaves above named, with the undivided moiety of the personal estate of Frances C. Smith, as before described, together with the future issue, and increase of the female slaves, to have and to hold, all and singular, unto them, &c. In trust however, and to and for the uses following, and for no other use, interest or purpose whatsoever. That is to say, first, to the use of her, the said Cath-

erine B. Smith, and her said intended husband James C. Kennerly, during their natural lives, at the death of either, then to the use of the survivor, during his, or her life ; at the death of such survivor, then to such child, or children of the said Catherine B. Smith, and the lineal descendants of such child or children, as may be then living, to them and their heirs forever. But should there be no child, or children of the said Catherine, nor lineal descendant living at the time of the death of the said survivor, then the said property to be equally divided, among the next of kin of the said Catherine, who may then be living, to them and their heirs forever. Yet the said Catherine shall, notwithstanding her coverture, by any writing, or writings, under her hand and seal, attested by two or more credible witnesses, or by her last will and testament in writing, duly executed, bequeath or leave any of the aforesaid slaves, or all of the same, to her said intended husband or any other person whomsoever. And nothing herein contained shall be so construed, as to prevent the said Catherine from disposing of by will, deed, or otherwise, all or any part of the above mentioned property, the right of which to be transferred after her decease. In witness whereof, &c.

This deed was proved, and recorded, in the office of the Secretary of State of South Carolina, on the 29th June, 1827. It was proved, that the parties were married on the day of the execution of the deed, and continued to reside in South Carolina from that time, until the year 1835, when they removed to Franklin county, Alabama, where the plaintiff James Kennerly resided, and where they continued to reside, until the levy upon the slaves. The plaintiff proved they were the same slaves mentioned in the deed ; that Kennerly and his wife are yet living, and have children. The plaintiff also read copies of the acts of the Legislature of South Carolina, passed 8th March, 1785, of the 21st December, 1792, and of the 20th December, 1823.

The plaintiff also proved, that one of the trustees had possession of the slaves for two years, after the execution of the marriage contract, in the State of South Carolina ; that they were then delivered into the hands of James C. Kennerly, the

husband, who has retained possession of them from that time down to the levy.

The defendant produced, and read, sundry writs of *fiery facias*, and of attachments levied on said slaves, and proved, that these debts were contracted by J. C. Kennerly, after his removal to Alabama, and while he was in undisturbed possession of the slaves.

The defendant offered to prove, by a witness, that the husband, J. C. Kennerly, and James Kennerly, the trustee, had concealed the slaves, and endeavored to run them off, to prevent their being levied on, and that at the time of the levy, they were found concealed in the house of the trustee, but the court rejected the testimony, holding that the acts and admissions of the husband, or trustee, could not affect the rights of Mrs. Kennerly, under the deed; and the defendant excepted.

The plaintiff, by way of rebutting proof, produced and read, a statute of South Carolina, passed 20th December, 1832.

The court then charged the jury, that if they believed the evidence, the deed, although not registered in South Carolina, was valid between the parties, and valid in Alabama, as to all the world, unless the creditors in the executions were South Carolina creditors. That the statute of frauds, did not require the deed of marriage settlement, under which the plaintiff claimed, to be recorded in this State. That the husband had not such an interest in the property, as could be sold under execution, and that the rights of the wife could not be affected by the acts of the trustees; and if they permitted the husband to have the possession of the property, it did not affect the rights of the wife.

The court refused, on motion of the defendant, to charge, that the power of revocation reserved to the wife in the deed, avoided it, as to creditors and purchasers. That the permissive possession of the husband, was a loan by the trustees, and if continued for more than three years, without registration, or without demand made, and pursued by due course of law, the slaves were liable for the debts of the husband, under the second section of the statute of frauds. That the deed is void in favor of creditors, as to the slaves mentioned

in the deed, as constituting an undivided moiety of the estate of Frances C. Smith, under the act of South Carolina, of 21st December, 1792. To the charges given, and to those refused, the defendant excepted, and now assigns for error, the matters of law arising out of the bill of exceptions.

J. A. NOOE and J. B. SALE, for plaintiff in error.

L. P. WALKER and J. W. McCLUNG, contra.

ORMOND, J.—The interesting question here presented, is one which has frequently engaged the attention of this court, and settled, so far as the decisions of this court can settle any legal principle, commencing with the case of *Harkins v. Coalter*, 2 Porter, 463, and running through most of the subsequent volumes. The uniform tenor of these decisions is, that to exclude the husband from the enjoyment of the estate, and prevent his marital rights from attaching upon it, there must be a clear and manifest intent to create a separate estate in the wife. [*Lamb v. Wragg and Stewart*, 8 Porter, 73; *Dunn and wife v. The Bank of Mobile*, 2 Ala. 152; *Inge v. Forrester*, 6 Ib. 418; *Bank v. Wilkins*, 7 Id. 589; *O'Neal v. Teague*, 8 Id. 345.]

It is an inseparable incident, of a separate estate in the wife, that the husband has no control, or dominion over it. As to that estate, she is considered, and treated, as a *feme sole*, and hence, in many of the cases cited, the wife was held not to have a separate estate, although the conveyance was to a trustee for her use, because, although no estate, or interest was in terms secured to the husband, by the deed, his control, or dominion over it, was not necessarily excluded. This case, however, is free from the difficulty which existed in those referred to, as an express estate for life, is guarantied to the husband, in the slaves and other property, which is utterly hostile to the idea of the wife having a separate estate in the same property.

But it has been strenuously argued, that from the recitals of the deed, and the manifest design evidenced by making the deed, as shown from the surrounding circumstances, it was evidently the interest of the parties to create such an estate as should not be subject to alienation by the husband, or

liable for his debts; and that this intent, when ascertained, will control the language employed by the parties. There can be no doubt, it is the intent of the parties which is to govern the construction of the deed, and that the intent, when ascertained, if lawful, will be enforced. It is also true, that no particular form of words is necessary to the creation of a separate estate in the wife. But this intent to exclude the marital rights of the husband, must be evinced by the language employed in the creation of the estate. The surrounding circumstances, such as the insolvency, or straitened condition of the husband, and the fact even that the husband and wife are parted, will not be sufficient evidence of an intent to create a separate estate in the wife, in the absence of language evidencing such an intent, in the creation of the estate. [Palmer v. Trevor, 1 Vern. 261; Harkins v. Coalter, *supra*, and many other cases decided in this court; Clancy on Rights, 263; and 2 Story Eq. § 1381-2, and cases cited Brown v. Clark, 3 Vesey, 166; Adamson v. Armitage, 19 ed. 416; Maberry v. Neely, 5 Hump. 337; Wills v. Sayers, 4 Madd. 409; Roberts v. Spicer, 5 Id 491; Lumb v. Milnes, 5 Vesey, 517.]

If the surrounding circumstances could be looked to, to control the language employed in the deed, it would avail nothing in this case. The purpose avowed in the deed, is to secure the property against accident, or misfortune, and as it was made on the eve of marriage, the intention doubtless was, to prevent the property from being wasted, by the improvidence or prodigality of the husband. How did they undertake to accomplish this? Not by excluding the marital rights of the husband, and vesting the wife with a separate estate, for this is sedulously guarded against, by giving the use of the property to the husband and wife, during their lives, and the life of the survivor, with a power of alienation to the wife, to take effect after the death of herself, and husband. The language of the deed, then, is in direct accordance with the avowed, as well as the probable intentions of the parties; and it is a perfectly gratuitous assumption, that they intended to create a separate estate in the wife. They doubtless intended to create an unalienable estate, and have employed language appropriate to their intentions. It cannot

avail the parties, that this intention is one which the law will not enforce, and that the husband will take the property discharged from this illegal condition. This is a consequence which flows from their acts, and they cannot be heard to say, they did not intend the consequence which their deliberate act imports.

One of the inseparable incidents of the ownership of personal property is, that it shall be liable for the debts of the owner, and that a restraint upon its alienation is void. *Brandon v. Robinson*, 18 Vesey, 429. An exception obtains, in the case of the separate estate of a married woman, which it appears, may be so secured, that the wife herself has not the power to alienate it. [*Tullet v. Armstrong*, 1 Beavan, 3.] But what right has this court to say, in opposition to the express language of the deed, that the husband was to have no interest in the property? How can it now be known, that he would ever have consented to the creation of an unalienable, separate estate in the wife?

If this is not the separate estate of the wife, it is liable at law to the debts of the husband, having been reduced to his possession. This follows necessarily from the established law, that the chattel interests of the wife, when reduced to the possession of the husband, are his property. There is no such thing known to the common law, as a partnership, or community of goods between husband and wife. In law they constitute but one person, and cannot hold, either as joint tenants, or as tenants in common. If, therefore, there be a conveyance of land, to husband and wife, each is seized of the whole. In the technical language of the books, they are seized *per tout* and not *per my*. [2 Black. Com. 182; *Doe ex dem. De Peyster v. Howland*, 8 Cow. 277; *Barber v. Harris*, 19 Wend. 617.] As a consequence of this doctrine, if a conveyance were made of lands to husband and wife, and a third person, the husband and wife would take but one half the land, and the third person the residue. In the case supposed of a conveyance of land to husband and wife, the husband could undoubtedly dispose of the estate of his wife in the land, during his own life, and accordingly, in the case of *Barber v. Harris*, *supra*, it was held, that he could mortgage it for that period. This being

the law, as to the life estate of the wife in land, *a fortiori*, must it be the law, when it is a chattel interest; reduced to the possession of the husband.

There is however, a class of cases, with which this must not be confounded—these are those where an interest in property is given collectively, to a married woman and her children, for their support, and maintenance. In this class of cases, if the husband, in virtue of his marital rights, has an interest in the property, it cannot be subjected at law to the payment of his debts, but his interest, (if any he has,) can only be reached in equity, where the respective interests of the wife, and children, can be ascertained, and separated. The case of *Fellowes and others v. Tann*, 9 Ala. 1002, and *Spear v. Walkley*, 10 Ala. 328, are of this description. In both of these cases, it was held, the interest of the husband could not be sold at law, as that would destroy the trust; and in both, the question was left open, whether the husband had such an interest as could be reached in equity. See also the case of *Rugely & Harrison v. Robinson*, 10 Ala. 702, where a kindred question was discussed at great length.

The facts of this case are entirely different. This is the creation of a life estate in the husband and wife, with a remainder to the children. They have no interest whatever in the slaves, which are the subject of the conveyance, during the lives of their parents, which, as in the cases cited, would entitle them to a portion of the proceeds of their labor during the continuance of the life estate: and have indeed but a contingent interest in the remainder, as their mother has the power, by deed or by will, to dispose of all; or any part of the estate, to take effect at her death.

The case of *Scott v. Gibbon*, 5 Munford, 86, is a decision adverse to the view here taken. It is to be remarked that no authority is cited in support of the decision of the court, and it appears to have been made without sufficient consideration. This was afterwards followed, in the cases of *Hughes v. Pledge*, 1 Leigh, 443, and *Roans v. Archer*, 4 Id. 569; but these cases are decided upon the authority of the preceding case, without inquiry or examination.

We will next consider, how the interest of the husband, in this property, may be subjected to the payment of his debts.

As to his own life estate, it is obvious it is a pure legal estate, and may be sold under execution; and the question in respect to the life estate of the wife, reduced to his possession, has been also decisively settled by the decisions of this court—that it may be reached by execution at law.

In some of the cases previously cited, the property had been conveyed jointly to husband and wife; and in others to a trustee for the benefit of the wife alone. In *Lamb v. Wragg and Stewart*, 8 Porter, 73, the conveyance was to the husband as trustee, which trust he had resigned, and another had been appointed in his stead. The husband being in possession, it was held that his interest in the property could be sold under execution, but whether the fact, that the legal title was outstanding in another, interposed any obstacle to a sale at law of the husband's interest, does not appear to have been made in the argument of the cause, or considered by the court. But this point distinctly arose in judgment, in the case of *Nelson, Carleton & Co. v. Banks*, 7 Ala. 32. There the wife had a life estate in a slave, the legal title being in a trustee, and the husband having reduced the slave to his possession, it was held his interest could be sold by execution at law, against him. This decision was affirmed in *The Bank v. Wilkins*, 7 Ala. 592, and in *O'Neil v. Teague*, 8 Id. 345. In both of these cases, the legal title was in a trustee, but the possession being with the husband, was held subject to levy and sale for the payment of his debts; and in all, as in the present case, there was a remainder over, to the children of the husband and wife.

In this State, it has long been the settled doctrine, that similar equitable, chattel interests, could be sold by execution at law. In *McGregor & Darling v. Hall*, 3 S. & P. 397, this court held, that the possessory interest of a mortgagor, in slaves, could be sold by execution against him at law; and in *Williams and Battle v. Jones*, 2 Ala. 314, the present court held, the law thus settled, applicable to the maker of a deed of trust. This has been acted on from that day to the present time, and a multitude of such sales have been made. With what propriety can a distinction be made between such cases, and the present? Why should a distinction be made, between the case of a legal title outstand-

ing in a trustee, in a deed of trust, to secure the payment of debts, and an outstanding legal title in a trustee, to preserve a remainder; the use, and right to the possession, being guarantied to another for life? In both classes of cases, the right to use, and possess the property, is guarantied for a certain, specified period. It is not a mere right to the profits, arising from the employment of the thing conveyed, but it is a right to the use, and enjoyment of the thing itself. It is something, real, visible, tangible. Although it may be called a *use*, it is in truth, and in fact, the ownership of an estate in the property, for the life of the tenant. The mere naked title, outstanding in a trustee, to preserve the remainder, gives the trustee no power over the possessory interest of the tenant for life; and it appears to us, that in principle, there is not a shade of difference, between the interest of the husband in such cases as the present, and the possessory interest of a mortgagor, or maker of a deed of trust. When he is to all practical purposes the owner of the property during his life; when he may sell, and transfer his interest to another, why may not the same thing be done by the sheriff. The effect in both cases is precisely the same. In either case, the purchaser obtains, with the possession, the life estate of the tenant, and if the remainder is exposed to improper hazard, a court of equity will interpose, and protect it. In what respect does such an estate as this, differ from a lease-hold, real estate, or from the unexpired term of hire in a slave; yet no doubt can be entertained, that in either of these cases, the estate of the tenant could be sold by execution at law. It would be yielding the substance, for the shadow, to hold that there was any difference between them.

We have examined with great care, the decision made by the majority of the Court of Appeals in South Carolina, in the case of *Ioor v. Hodges*, 1 Spears' Eq. 593, where it was held, in a case similar to the present, that the interest of the husband in possession, could not be sold by execution at law. It is not necessary that we should examine the previous decisions of that court, to ascertain whether, as contended by the dissenting judge, the judgment there rendered, was in hostility with them. The decision there made, impliedly recognizes, that the interest of the husband could be reached

in equity, and in a question relating to the remedy, it cannot be expected we should abandon the decisions of our own court, long since made and acquiesced in, upon the authority of any tribunal, no matter how weighty it may be, even if we did not consider the decisions of this court abstractly correct.

An argument has been urged, founded upon the phraseology of the deed, by which the slaves are conveyed to the trustees, "in their actual possession." The argument is, that the possession is conveyed to the trustees, and that the beneficiaries are only entitled to the profits of the labor of the slaves. The deed was executed previous to the marriage, which may perhaps explain why the actual possession was conveyed to the trustees, as well as the legal title; it is however conveyed to them in trust, for the *use* of the husband and wife. The use of the slaves, implies the right of possession, which would alone render the use effectual or beneficial, by their employment as domestics, or in agricultural pursuits. It is the habit of the people of the southern states, to derive a revenue by the employment of their slaves in agriculture, and it is most unreasonable to suppose, it was intended these slaves should be hired out by the trustee, during the whole continuance of this marriage, and indeed until the death of the survivor. Admitting that the deed could have been so drawn, as to exclude both husband and wife from the possession, and confine them to a perception of the profits arising from the employment of the slaves, in this case they are entitled by the terms of the deed, to the *use* of the slaves, and that authorised them to have the possession. We think the trustees construed the deed correctly, by delivering the possession of the slaves, and that they could not rightfully have withheld it. If this were not the correct exposition of the deed, they certainly have the power under the deed, to permit the beneficiaries to have the possession of the slaves, if in their judgment it was the most appropriate mode of executing the *use*, under all the circumstances of the case. Having, in the exercise of their discretion, delivered the possession to the husband, the trust is executed, although the naked legal title may remain in them, for the purposes of the remainder, subject to the con-

tingency of the wife conveying the title to her husband, or some other person during her life.

This case is not within the second section of the statute of frauds. That applies to a possession, held under a loan, or where there is a reservation by way of condition, reversion or remainder, retained by another. In such cases, after a possession of three years without a registration of the deed, disclosing the nature of the estate, the absolute property is as to creditors and purchasers, considered to be with the possession; or in the language of the act, to be considered fraudulent. But here the possession is where, by the terms of the deed, it should be. It is not a loan, nor is there any reservation of an interest by the trustees. Whether the property in the hands of the trustees, without registration of the deed under which they held, would not be liable for the payment of *their* debts, is an entirely different question. That is the effect of the case of *Craig v. Payne*, 4 Bibb, 337, relied on by the counsel for the plaintiff in error, but it has no application here.

The marriage settlement being made in South Carolina, its legal effect must be ascertained by the law of that state. By the law of that state, such instruments, if not recorded in a mode pointed out, are declared to be void as against creditors. But an act of the same state declares, that such settlement, though not recorded, "shall be regarded as valid, between the parties themselves." Being valid between the parties to it in South Carolina, where it was made, that must be its effect here. The provision in relation to creditors can have no *extra* territorial efficacy, as a law, and was not intended to apply, except to debts created, or attempted to be enforced in South Carolina.

Other points were presented upon the record, and were argued here, but we abstain from their consideration, as we presume the questions decided will suffice upon another trial for the decision of the cause.

Our judgment is, that upon the facts stated on the record, the life estate of the husband, and of the wife, during the life of the former, in the slaves in controversy, are liable at law for the debts of the husband.

Let the judgment be reversed and the cause remanded.

DICKINSON v. THE BRANCH BANK AT MOBILE.

1. When a bill of exchange is drawn in this State, payable "at the Merchants Bank in the city of New York," this court will take judicial notice that the *city of New York*, is the commercial city of that name, beyond the limits of this State.
2. When a bill is drawn within this State, payable at a place beyond its limits, interest, and damages cannot be recovered of the acceptor, upon its dishonor, without proving the law of the place of payment, giving such damages, and interest.
3. It is no objection that interest, and damages for non-payment, are included in the same entry of judgment, without specifying the amount of each, separately.

Writ of Error to the Circuit Court of Mobile.

THIS was a proceeding by notice and motion, at the suit of the defendant in error, against the plaintiff, as the acceptor of a bill of the following tenor :

"\$1,000.

Mobile, May 31, 1841.

Sir—On the 20th day of December next, pay to David Files, or order, one thousand dollars, (this my second exchange, first of the same tenor and date unpaid,) negotiable and payable at the Merchants' Bank in the city of New York, for value received, and charge the same to the account of

Your ob't servant,

WM. CRAWFORD.

To WM. C. DICKINSON, Esq., Mobile.

On the 30th of November, 1846, a judgment by default was rendered by the circuit court against the defendant below for "thirteen hundred and ninety-eight 60-100 dollars, the amount of said bill of exchange, and the interest and damages thereon," together with costs. This judgment recites that thirty days notice of the motion had been given to the defendant; that the plaintiff produced the certificate of "C. C. Clay, F. S. Lyon, and Wm. Cooper, commissioners and trustees under the act of the General Assembly of said

State, to regulate the affairs of the banks, and provide for the payment of the State bonds, approved 4th February, 1846, that the said debt is really and *bona fide* the property of the said Branch Bank." In the transcript, a notice of the motion, and a certificate, is copied *in extenso*, both of which are drawn up in the names of Francis S. Lyon, Charles C. Clay, and Wm. Cooper, as commissioners and trustees, &c.

W. CRAWFORD, for the plaintiff in error, insisted that the acceptor of a bill of exchange was liable for interest after protest, according to the laws of the place where the bill was payable. [4 Pet. Rep. 123; 8 Metc. Rep. 107.] The decision heretofore made by this court, that the drawer of a bill in this State, payable elsewhere, will be chargeable with interest according to the laws of this State, because the statute gives interest on a protested bill against the drawer and indorser, does not embrace the present case.

The certificate of the commissioners, that the bill is the property of the bank, being required by the statute, is a part of the record; and the court must know that Charles C. Clay, is not the name of either of the commissioners: Further, the certificate purports to be signed by H. B. Holcomb, as attorney for the commissioners, and there does not appear to have been any proof of his authority.

It has been decided by this court, that the acceptor of a bill is not liable for damages, yet in the present case, judgment is rendered for both interest and damages, without specifying the amount of each.

J. W. LESESNE, for the defendant in error, insisted that it must be intended, from the bill being addressed to the acceptor, at Mobile, that it was there accepted by him, and the transaction was between citizens of this State. This being so, the law of the place of contract governs. [Arnot v. Redfern, 2 Car. & P. Rep. 88.]

It cannot be known judicially, that 'the city of New York' is not within the State, where the record is entirely silent upon the subject. And the fact of the bill being payable at the 'Merchants Bank,' can have no influence in attaining such a conclusion.

The objections to the certificate, that the plaintiff below was the *bona fide* proprietor of the bill, even if well taken, cannot avail the defendant. The judgment entry recites a proper certificate, and that *professed* to be copied in the transcript, is no part of the record.

Judgment is not rendered for the statute damages allowed against the drawer of a bill drawn in this State—this will be ascertained by calculating interest since the dishonor of the bill; which added to the principal, makes the aggregate of the recovery.

COLLIER, C. J.—In *Hanrick v. Andrews & Bros.* 9 Porter's Rep. 9, it was decided that where parties enter into a contract, without any stipulation for interest, but upon which, on default of payment, interest accrues, its rate must be ad-measured by the laws of the country where the contract was made; unless the parties contracted in reference to another jurisdiction, in which case the *lex loci solutionis* will govern. A bill thus drawn in N. York, payable in Alabama, if not paid at maturity, will draw interest according to the law of the latter, when sought to be enforced against the acceptor. His undertaking is absolute and direct to pay at the place where upon its face the bill is payable. In legal effect his acceptance is equivalent to the making a promissory note; and in such case the law of the place of payment ascertains the interest, if the law is silent in respect to it. See also *Story on Bills*, § 148, and citations in note.

Crawford v. The Branch Bank at Mobile, 6 Ala. R. 12, merely determines, that according to the rules of the law merchant, as well perhaps as a proper construction of our statute, the interest upon a dishonored bill, drawn in this State, on a person drawn in some other, when sued against the drawer, must be governed by the laws of Alabama in respect to interest. This decision is clearly correct, and depends upon reasoning which cannot be applied to the case at bar.

It must be intended, that the "city of New York," as expressed in the bill, is our great commercial emporium—a point at which quite half the revenue of the nation is collected from duties on imposts—a place recognized by almost

numberless acts of Congress, both public and private. This, independently of the history (statistical and general) of the country, forces on us a knowledge of the geography of New York, and that it is *extra territorium*. The cases of Hargrove, Smith & Co. 1 Ala. Rep. 80, and Smith v. Robinson, at the last term, go as far to limit judicial intendment on this point as we feel inclined, yet we are now called on to go quite beyond them. This we cannot do, without disregarding the influence both of reason and precedent.

In *Hanrick v. The Farmers' Bank of Chattahoochie*, 8 Porter's Rep. 539, we held, that the damages given by statute upon the dishonor of a bill of exchange were not recoverable of the acceptor of an inland bill. The same rule, upon a just construction of our statute, we think must hold, where a bill drawn here is payable in another State, if it does not appear that the laws of the latter give damages in such a case.

Upon calculating the interest according to the law of this State, we discover that the judgment does not embrace the statute damages. If a judgment for both interest and damages, could be supported in the condition of the record, it would be no objection that the clerk omitted to state in the entry, the several amounts of each—if the recovery did not exceed the aggregate of both. The old, and strict rule upon this subject has long yielded to the progressive spirit of more enlarged and liberal views of justice.

For the error of the circuit court in rendering judgment by *default*, for interest, and in the absence of evidence showing what the law of New York is upon the subject, the judgment is reversed and the cause remanded.

QUIGLEY v. CAMPBELL & CLEVELAND.

1. Where transcripts of records are referred to by the bill of exceptions, but are not certified with the record as a part of it, although attached to the transcript, this court will not consider them, as there is nothing to show they were the same, used at the trial.
2. Where transcripts are so attached, and the counsel for the plaintiff in error states he is surprised by an objection to the record at the argument in this court, and asserts they were the same used at the trial, this will warrant a *certiorari*, although moved for after argument of the cause.
3. Where a judgment is rendered against the plaintiff for a specific sum in a suit commenced by him as administrator, without directing the recovery *de bonis testatoris* its legal effect, until demanded, is *de bonis propriis*, and as such it cannot be given in evidence under a declaration describing it as *de bonis testatoris*.
4. The judgment obtained against the plaintiff in a suit by him as administrator under our statute of set-off, even when properly entered *de bonis testatoris*, is no evidence of assets in a suit upon it for a *devastavit*.
5. In such a suit on such a judgment, the record of the settlement by the administrator, although of a part of the administration, is admissible evidence, as it, with the vouchers, may show the amount of the debts against the estate, the periods when paid, and the extent to which the party is liable for the alleged *devastavit*.

Writ of Error to the Circuit Court of Mobile.

DEBT by Campbell & Cleveland against Mrs. Quigley. The declaration asserts that the plaintiffs, at the fall term, 1838, of the circuit court of Mobile county, recovered a judgment against the defendant, "as administrator of all and singular, the goods and chattels, rights and credits, which were of William Quigley at his death;" and that afterwards, that is to say, "at the fall term of said court, for the year 1838, it was considered by the said court that the plaintiffs should have execution against the defendant, administratrix as aforesaid, to be levied of the goods, &c. which were of the said William at the time of his death in the hands of the said defendant, administratrix as aforesaid, to be administered." A *devastavit* is then asserted, and the declaration concludes in the usual manner.

At the trial, the plaintiffs offered in evidence the transcript of a judgment had in a suit brought by Mrs. Quigley, as administratrix of Wm. Quigley, against Campbell & Cleveland, on promises to the intestate, which is in these terms: "Eliza Quigley, administratrix of William Quigley, deceased, v. Wm. A. Cleveland and James Campbell. This day came the parties, by their attorneys, and thereupon came a jury, to wit, J. S. and others, who, &c. find for the defendants, and certify from the items before them, that there is a balance due from the plaintiff to the defendants of \$1223. It is therefore considered by the court, that the plaintiff take nothing by her action, but that the defendants go hence, and recover of her the sum of \$1223, the amount certified to be due them by the jury aforesaid, and the costs in this behalf expended." The defendant objected to this judgment as inadmissible, but it was allowed to be read.

The plaintiffs then proved by a witness, that he, as auctioneer, had sold certain slaves, in 1836, at the instance of the defendant, as administratrix, and that the sales amounted to about \$18,000. They relied on this proof to show that assets had come to her hands. The defendant then introduced, and offered to read the records of the orphans' court of Mobile county, of the administration of the estate of Wm. Quigley, showing the appointment of the defendant as administratrix, on the 15th March, 1836—that she filed an inventory of the assets, as well as an account of sales, and that a settlement of said estate had been had, and a final decree rendered by that court, in which credit was given for the slaves sold. This evidence was excluded at the instance of the plaintiffs as incompetent, because the estate was not represented insolvent, and no part of the record was sufficient to be given in evidence. The excluded evidence is referred to by the bill of exceptions, in these terms: "copies of which records, as far as material, are hereto attached as part of this bill."

In the transcript, the record of the judgment in the suit of Mrs. Quigley against Campbell and Cleveland, as well as that of the proceedings on the estate of Mrs. Quigley, in the orphans' court, are not appended or annexed to the bill of exceptions, but are copied upon the writ of error, citation and

certificate of the transcript, as containing the record of the cause now before the court, but are not in any way verified as being the proceedings which are referred to in, and made part of the bill of exceptions.

The admission of the judgment in favor of Campbell and Cleveland, and the exclusion of the record of the proceedings in the estate of William Quigley, are now assigned as error.

J. A. CAMPBELL, for the plaintiff in error, insisted—

1. The judgment was not admissible, because it is not that described in the declaration. [Van Horn v. Teasdale, 4 Halst. 379.]

2. A suit for a *devastavit* cannot be sustained, until there is a judgment finding assets in the hands of the administrator, and subjecting them to the payment of the creditor's debt. [Wms. on Ex. 1223; 2 Lomax, 458.] So a judgment *quando acciderint* will not sustain a suit for a *devastavit*. [2 Lomax, 454, § 18, 30.] And the one in this case is of no higher degree. [Quigley v. Campbell and Cleveland, 5 Ala. Rep. 76.]

3. The record of the settlement in the orphans' court was proper to show what disposition was made of the assets of the estate. It may have been, that the assets of the estate were exhausted in paying debts before the plaintiffs' demand was notified to the defendant. The suit in which the set-off was certified was commenced in April, 1837, and determined in December, 1838. Besides this, if all the assets were not sufficient to pay all the creditors, the defendant could only be liable *pro rata* to the plaintiffs, even in case of a *devastavit*, and this could be shown by the settlement, which the statute declares shall be evidence. [Digest, 304, § 37; Simkins v. Cobb, 2 Bailey, 60; Burrus v. Barton, 1 A. K. Marsh. 349; 2 Lomax, 311; 8 Verm. 234.]

HOPKINS, contra, insisted—

1. That neither of the matters excepted to could be examined, because the records were not attached to the bill of exceptions, or certified by the clerk as being those which were so attached. [Haden v. United States, 4 Porter, 396.]

2. But if the exceptions can be examined, the judgment

was admissible, because the entry shows the suit was by the defendant in her representative character, and therefore the judgment is against her in that character also. It is properly declared on as such a judgment, that being its legal effect. [1 Porter, 510 ; 2 Ib. 236.]

3. The record from the orphans' court was not admissible, because it shows the county judge had no jurisdiction over the cause, he having certified that he was interested in the settlement, and commissioners having been appointed to act by a judge of the supreme court. After this appointment, the county judge had no authority, yet the proceedings are before him, and consequently void, there being no repeal of the authority to the commissioners.

2. It was also properly excluded, for the reason that it does not show that the money paid out by the defendant for the estate was all paid before the plaintiffs obtained their judgment, or paid after she had notice of their demand.

3. The proceedings in the orphans' court are not evidence against a creditor, as he is not a party to them, and therefore is not bound by them ; nor is the settlement in this instance one that is final, as it purports to be a settlement only so far as the administratrix had proceeded.

4. The judgment which was given in favor of the plaintiffs, and which is made the foundation of this suit, is not one *quando acciderint*, but is authorized by the statute. [Dig. 338, § 141.] Being a proper judgment, it is as much an admission of assets as any other. [2 Wms. Ex. 1200, *et seq.*; *Burke v. Adkins*, 2 Porter, 236 ; *Garrow v. Emanuel*, 3 Stew. 285.] The plaintiffs had the legal right to interpose their demand as a set-off to the suit of the defendant, and the judgment recovered on that set-off is as much a legal judgment as if it was rendered in a suit directly against the administratrix.

5. But independent of the judgment, the proof showed assets, and it was incumbent on the defendant at least to discharge herself. [6 Porter, 398.]

GOLDTHWAITE, J.—1. We think the exception to the records attached to the transcript is well taken, and that the certificate of the clerk, being attached to the bill of excep-

tions, without the exhibits, there is nothing in the transcript to show these were the same referred to by the bill.

2. But understanding the counsel for the plaintiff in error as stating, he is surprised by the objection now taken, and that he considered the exhibits as certified by the general certificate, as well as vouching that these exhibits were the same as used at the trial, we think it a proper case for the allowance of a *certiorari*.

Afterwards, the counsel for the defendant waived the issuing of the *certiorari*, and consented the exhibits should be considered as regularly certified.

3. Upon the merits of the case, there is small room for controversy. The judgment described in the declaration, is one against Mrs. Quigley *de bonis testatoris*; that offered in evidence is *de bonis propriis*. That this is its legal effect, is abundantly shown by the cases in this court, in which precisely the same judgment entered in a suit against an administrator in his representative capacity, has been held at first a proper ground for reversal, and subsequently a matter of amendment in this court. [Weatherford v. Weatherford, 7 Porter, 171; Oliver v. Hearne, 4 Ala. Rep. 271; Scott v. Yarborough, 5 Ala. 221.]

If then, the judgment requires to be amended, before the plaintiff can proceed to have execution *de bonis testatoris*, it is clear such is not its legal effect until amended. That such a judgment is not admissible when one *de bonis testatoris*, is alleged in Van Horn v. Teasdale, 4 Halst. 379. In our judgment, the court erred in not excluding the record offered in evidence.

4. The other exception requires us to determine the effect which this judgment would have against the defendant if properly entered against her in her representative character. This was passed on to some extent in the case of Quigley v. Campbell, 5 Ala. Rep. 76. We there say, in effect, that a judgment obtained by the defendant against an administrator plaintiff, under the provisions of the statute of set off, cannot be construed as an admission of assets. The reason why a judgment under this statute has no effect as proof of assets against the administrator, is, that no opportunity is afforded to contest the fact of assets, to answer the particular debt as-

certained. If the plaintiff to a plea of set off was to reply a plea of *plene administravit*, she would admit the set off, and as the law stood at the time of the enactment, double replications were not allowed. [1 Chit. Plead. 614.] Under the act as it was first enacted in 1799, an execution was not allowed in the first instance, but in all cases the party was to be called on to show cause why one should not go for the sum certified to be due. [L. of Al. 457.] Its subsequent alteration in 1827, although it allows execution to issue at once upon the judgment, does not prescribe that any effect shall be given it when against an administrator, as an admission of assets, and it seems to us a harsh and unreasonable construction, when full effect can be given otherwise to its terms. No injury is done to the plaintiff by requiring him to establish that assets have come to the hands of the administrator, out of which he is entitled to payment, either in full or in part, and without such proof, there is no justice whatever in allowing him to recover.

5. This construction of the statute, as it casts the *onus* of showing assets upon the party alledging the *devastavit*, independent of the judgment, also lets in the administrator to show their proper administration, previous to the fixing of his liability, either by notice of the debt, or by obtaining the judgment; and for this purpose it seems to us, the record of the proceedings in the orphans' court was admissible evidence. The statute provides, that "the documents and evidence of all settlements made with executors, administrators, and guardians, shall be carefully preserved, and the settlement entered of record; which evidence, vouchers, documents and settlement, shall be good evidence in any suit for and against such executor, &c., and shall not be impeached except for fraud in obtaining the same." [Dig. 304, § 37.] The object of this enactment was, doubtless, to provide a security to persons acting in this capacity, that the vouchers, &c. passed upon as correct by the judgment of the orphans' court, should be at least *prima facie* evidence of the facts stated by them in any collateral suit. Without some such effect be given, the inconvenience to this class of persons would be im-

mense, if they were required to make out by extraneous evidence, the correctness of every payment made, or other administration of the assets by them. It will be seen we give no opinion upon the effect of this record, as it is uncalled for by the case presented; but we cannot doubt, that if the vouchers or settlement established the administration by the present defendant, of the assets of the estate, the amount of the debts against it, or the periods when they were paid, these facts were important in ascertaining whether there was a devastavit, as well as the extent to which the defendant is responsible to the plaintiffs. Upon both grounds excepted to, we think the court erred.

Judgment reversed, and cause remanded.

RUMPH v. ABERCROMBIE.

1. A court of chancery has jurisdiction to set aside a deed, conveying either land or slaves fraudulently obtained.
2. A contract for the sale of slaves at an inadequate price, obtained by an abuse of confidence, reposed in the vendor, by the vendee, will be set aside in equity, especially in a case, where the vendor was in a weak condition of body, and in a gloomy, unsettled state of mind, so as to be peculiarly liable to imposition.

Error to the Chancery Court of Macon.

BILL filed by defendant in error, alledges, that complainant's intestate, was the owner thereof, and in possession of five slaves, a negro woman and her four children. That his intestate, before, and up to the time of her death, lived on the premises of defendant, who was a shrewd, subtle, crafty man—and the deceased, old, weak minded, imbecile, and infirm, and long before, and up to the time of her death, whol-

ly incapable of protecting her interest, or of attending to her business. That shortly before her death, the defendant, under the guise of friendship, and by fraud, and false representations, obtained the possession of the slaves, and now holds them under a pretended bill of sale, by which the deceased appears to have acknowledged the receipt of one thousand dollars; but complainant charges that he never paid any thing, and that one thousand dollars is not more than half their value. That the defendant had the most perfect control over the deceased, and that she regarded him as her friend, and protector, and that he obtained the slaves by a fraudulent abuse of his influence over her.

The bill also charges, upon information and belief, that the conveyance was merely intended as a mortgage, to secure the repayment of money advanced by the defendant, for the deceased. That the negroes are family slaves, to which complainants are much attached, having been raised with them, &c.

The prayer of the bill, is for the cancellation of the bill of sale, the delivery of the slaves, and for general relief, &c.

The defendant answered the bill, and admitted that the deceased resided on his premises, for about a month previous to, and at her decease. That she was affected with dropsy of the chest, and from that cause infirm of body for some time previous to her death, but denies that she was very old, weak minded, &c., but on the contrary asserts, that she was possessed of a sound mind, sane memory, and vigorous intellect, up to the time of her death, and fully able to dispose of her property in a prudent, judicious manner. That the deceased, previous to her removal to defendant's premises, proposed to sell him the slaves, but declined at that time to fix the value, or put a price on them, stating that she preferred a postponement until after her removal to the premises of defendant; and in the mean time would reflect upon it, and make up her mind as to their value.

Shortly after her removal, in October, 1844, she again proposed to sell the slaves to him, and offered them for \$1,000, in ten equal annual payments—defendant objected to pur-

chase on these terms, and offered her \$800 in cash, which he considered at the time as their full value; but she declined that proposition, and desired the payment by instalments, for the benefit of her young children. That under these circumstances, and after much persuasion, he became the purchaser of the slaves, upon the terms proposed by her, in good faith on his part.

After the contract was made, it was agreed between him, and her, that he should furnish her with such household furniture, family supplies, and other necessities as she wanted, to the amount of one, or more of the notes executed by him. That he did furnish such articles as she wanted, to the amount of \$180 37, and that his medical services are worth \$120. That she died on his premises, leaving her property unprotected; that therefore he took possession of the notes executed by him for the slaves, three of which he retains to pay his claim against her, and the residue he brings into court. He makes an exhibit of the conveyance of the slaves to him, dated the 15th October, 1844. He denies all fraud, &c., &c.

The testimony, so far as it is important, will be found in the opinion of the court.

The chancellor considered, that the facts established, that the defendant had purchased the slaves from the complainant, by taking advantage of the influence he had obtained over her, and had availed himself of her weakness, to obtain an unconscionable bargain from her; set the contract aside, directed him to deliver up the slaves, and ordered an account to be taken.

From this decree the defendant prosecutes this writ, and his assignments of error open the entire case.

GUNN, for plaintiff in error, insisted that the allegations of the bill were not sustained by the proof. That the weight of evidence was decidedly in favor of the defendant, both as to the capacity of the vendor to make the contract, and the fairness of the contract which was made, as shown by the price given. That if the price was not fully adequate, it was not so grossly inadequate as to be evidence of fraud. He cited *Hardeman v. Sims*, 3 Ala. 747: *Bibb v. McKinley*, 9

Porter, 636; Bibb v. Smith, 1 Dana, 582; Jer. Eq. 395; 2 Vesey, 155; Todd v. Hardie, 5 Ala. 698; Morris v. Bartley, 2 J. J. M. 374; Thompson v. Jackson, 3 Rand. 504; Gist v. Frazier, 2 Litt. 18; Bozman v. Draughan, 3 Stew. 243; English v. Lane, 1 P. 328; Juzan v. Toulmin, 9 Ala. 663.

McLESTER, contra.

ORMOND, J.—The objection to the jurisdiction of chancery, upon the ground that there is no sufficient allegation in the bill, to authorize a recovery of these negroes, as “family slaves,” need not be considered, as it is perfectly clear, the court of chancery has jurisdiction to set aside a deed fraudulently made, or obtained, of either land, or personal property—and it is no answer to this, that a court of law has concurrent jurisdiction in cases of fraud. [1 Story’s Eq. 68, § 60, and cases there cited.]

We are then to consider, whether the conveyance of the slaves in this case, was obtained by the defendant, under such circumstances as require a court of equity to cancel the contract.

An old woman, in the last stage of a mortal disease, and greatly depressed in spirits, without, as it appears, a home, and in want of the ordinary comforts of life, but possessed of five slaves, is carried by the defendant, who is a physician, to his house, for the purpose, as alledged of taking care of her and her children. On the third day after her arrival at his house, she conveys to him the slaves, at the price of \$1000, on a credit of ten years, secured by ten notes of one hundred dollars each, with a cotemporaneous agreement, that the defendant should furnish her such articles of household furniture and provisions as she might need, to be taken out of the notes executed by him. These facts are certainly calculated to arouse suspicion of the fairness of the transaction. This suspicion, an examination of the testimony shows to be well founded, and makes out a case which calls for the interference of a court of equity.

• It is distinctly alledged in the bill, that she was incapable, from bodily and mental infirmity, of protecting her interests,

or attending to her business for a considerable period, anterior to the making of this contract, and down to the time when it was made. That she was in this condition previous to her removal to the defendant's house, is conclusively established by the witnesses Merrill, Crabtree, Spence, M. Crabtree, Sizemore, and Dr. Cloud. These witnesses, who knew her will, and most of them long before her death, all concur in stating, that she was unable to attend to her business, or make contracts. The last witness, Dr. Cloud, was her physician during the year she died, to the latter part of August. He says she had a complication of diseases—had fits of delirium. That her mind was in an unsettled, gloomy condition. That she was entirely incompetent to the discreet management of her business, and might be easily imposed on. He thinks she had not sufficient capacity to make a contract.

On the other hand, the defendant by his answer denies the allegations of the bill, and insists that she was fully competent to attend to her business, and he has introduced several witnesses, who saw her at his house, and who swear that they think she was able to contract understandingly, in reference to her property. We do not think this testimony entitled to the same weight as the preceding, as these witnesses had but a casual knowledge of, or acquaintance with her, and might therefore be deceived. We think, however, that the result of the testimony is, that she was not *non compos mentis*, at least at all times, but that she was in a low, weak condition of body, and from the gloomy condition of her mind, as described by the witnesses, peculiarly liable to imposition, by one in whom she reposed confidence; and such we think is the result of the proof.

The defendant removed the deceased to his house, upon a promise on his part, to take care of her and her children, and the third day after her arrival, he purchases the slaves. The reason assigned for the unusual credit of ten years, without interest, is, that the deceased desired to keep the proceeds of the sale from being wasted after her death, and as a fund for her children; yet it appears that at the time she was without a home, and destitute of the comforts, as well as the necessaries of life; and as this was the only property she possessed, it must have been looked to as the only means of

her support. Accordingly we find, that at the time of the sale, the defendant contracted to furnish her with what she wanted, and as the notes were extinguished by this process, they were to be delivered up to him. Although she lived but about three weeks after the sale, the account of the defendant against her, during this short period, amounted to three hundred dollars; and it is not a little extraordinary, that one item of the account, is a charge for negro hire.

The answer of the defendant, and the proof made by him, of what took place at the sale, is quite sufficient to stamp upon the transaction its true character. The whole scene, as detailed by the witnesses, and by the defendant himself, forcibly conveys the idea of mental imbecility and blind confiding credulity on the hand, and the exercise of a controlling influence on the other.

The unwillingness of the defendant to purchase the slaves, clogged with the condition of taking care of the deceased, and her family—his offer of \$800 in cash, rather than to pay \$1000 in ten annual payments without interest—the urgent solicitation of the sick woman, who pleaded her destitute condition, and the neglect of her family, and when this failed to move the defendant, his final consent to make the purchase, on being reminded by the sick woman, of his promise to do so, together with the array of witnesses who are present to witness this scene, and who afterwards depose to it, so far from establishing the fairness of the transaction, do most unequivocally prove the imbecility of the deceased, and the influence which the defendant had over her. Two of the witnesses afterwards attest a formal bill of sale, which is drawn up, and the unusual precaution taken of proving, and recording it in the county court.

We cannot doubt, that this contract was obtained by the defendant, by taking advantage of the weakness, and necessitous condition of the deceased, and of the confidence she reposed in him. It is a settled rule of equity, that if confidence is reposed, and that confidence is abused, equity will grant relief. [*Gartside v. Isherwood*, 1 Bro. C. 150; *Osmond v. Fitzroy*, 3 Peere W. 329, and cases cited by Mr. Belt in his note; *Watt v. Grove*, 2 S. & L. 507; *Wendell v.*

Van Renselaer, 1 Johns. C. 350; Hugennin v. Basley, 14 Vesey, 290.]

When, by an abuse of the confidence of another, property is obtained at an inadequate price, equity will pronounce it fraudulent, and set it aside. Such appears to be the fact in this case. The slaves are proved to have been very likely, and consisted of a woman, from thirty-five to forty years old, and her four children, a girl twelve or thirteen years old, a boy nine or ten, a boy seven, and a child four years old. These are estimated by several of the complainant's witnesses at \$1350 in cash, at the time of the sale to the defendant. The defendant has introduced several witnesses, who swear that the slaves were not worth more than the defendant agreed to pay for them, upon the credit given; and what is not a little extraordinary, some of them state, that the expense and trouble of taking care of them is only a fair equivalent for the value of their labor. These estimates of value, are made in gross, without setting a value on each of the slaves, as was done by the witnesses on the other side, and is for this, and other reasons, not deserving of the same consideration. There is, however, a fact in proof, which establishes conclusively, the gross inadequacy of the price. Two of the complainant's witnesses prove, that a short time before the sale to the defendant, they had offered her \$2000 for the slaves, on the same terms they were sold to the defendant. Surely, it would not require very stringent proof to establish, that five slaves of the description of these, were worth more than \$1000, on ten years credit, and the fact last stated is conclusive. It is equally clear, that the principal, if not the sole inducement of the sale to the defendant, was the expectation held out to the deceased, that she and her family would be taken care of by him. How this promise was kept, is shown by the account raised against her, during the short time she lived after the sale was made. We think it impossible to doubt, upon the whole case, not only that \$1000 was a grossly inadequate price for the slaves, sold without interest on ten years' credit, but that the purchase was obtained by the defendant, from the confidence reposed by the deceased in him, and the influence he had obtained over her, in her weak and necessitous condition, by his promises of

support and protection. The chancellor did not err in cancelling the contract, and directing the slaves to be delivered up to the complainant.

Decree affirmed.

McMAHAN v. GREEN.

1. When a *lien* has attached on personal property, by the delivery of a *fiery facias* to the sheriff, which during the continuance of the *lien*, is removed by the defendant in execution to another State, and sold, it may be levied on and sold, by an *alias* execution, if brought back again to this State.
2. *Quere*, would not the foreign purchaser acquire a good title by a purchase at a judicial sale, or would not the remedy be lost, if the property had remained long enough in the foreign country, for the statute of limitations to bar an action for its recovery.

Writ of Error to the Circuit Court of Barbour.

THIS was a trial of the right of property under the statute, in which the plaintiff in error was the plaintiff in execution, and the defendant the claimant. The property in question is a female slave, levied on to satisfy a *fiery facias* against the goods and chattels, &c., of William F. Evans and others. An issue was made up and submitted to a jury, who returned a verdict in favor of the claimant, and judgment was rendered accordingly. From a bill of exceptions sealed at the trial, it appears that the slave was removed by Evans, from Pike county, in the fall of the year 1839, while a *fiery facias*, (of which the one levied was a regular, and immediate *alias*) was in the hands of the sheriff of the county last named. These facts were disclosed to the claimant at the time he purchased the slave in Florida of Evans, whither the latter had removed her. The claimant after his purchase, brought the slave to Barbour county, where she was levied on by

the plaintiff's execution. The court charged the jury, that under these circumstances, the lien of *fi. fa.* did not re-attach upon the slave being brought back into this State, and that the title acquired by the claimant, was independent of any execution liens in this State.

J. E. BELSER and J. BUFORD, for the plaintiff in error.—The delivery of the *fieri facias* to the sheriff of Pike, operated a lien upon the slave, and could not be affected by her removal to another county, or even without the limits of this State, where, as in this case, the lien has been followed up with all legal diligence. The effect of the lien is to give to the plaintiff a right which cannot be divested by the defendant without his consent, and to take from the latter the power of disposing of the property so as to defeat a satisfaction of the execution. [1 Ala. Rep. 678, 364; 7 Id. 632; Gilp. R. 101; 1 Mason's Rep. 321; 1 Pet. Rep. 443; 10 Id. 176; 1 Johns. Rep. 479; 2 Dana's Rep. 408; 3 Id. 213; 4 Bibb, 532.] It is shown by these citations that although a special property in the goods of the defendant in execution, do not vest in the sheriff, unless a levy has been made, yet the delivery of the execution to the officer imposes a lien which the debtor cannot, by any act of his, defeat. The jury might have inferred from the evidence, that the claimants purchase was made to defeat or delay creditors, and void, under the statute of frauds. If this be so, the charge of the court was erroneous, in assuming the reverse as a legal conclusion.

J. COCHRAN, for the defendant in error. The lien of an execution is not dependent upon a contract, but is given by law; and it is the fact of the personalty being in the county to which the *fieri facias* issues that causes the lien to attach. [8 Port. Rep. 147; 1 Ala. Rep. 678.] If property is merely removed to another county after the lien commences, it is *suspended*, and may be made operative by suing an execution to that county. [7 Ala. Rep. 632.] But when the thing is removed beyond the jurisdiction of the State, all process is inoperative against it, and if the defendant there sells it for a

valuable consideration, the lien is forever gone, though it be brought within this State. The claimants knowledge that the property had been removed from Pike county to Florida, and that the slave, previous to her removal, was subject to the lien of an execution, can have no effect upon the claimant's title—such knowledge does not warrant the implication of a fraud. A legal title vested in the claimant by his purchase—there having been no actual levy of the plaintiff's execution previous to the removal, which was necessary to divest the defendant's property. [1 Ala. Rep. 359.]

COLLIER, C. J.—By the act of 1807, “concerning executions, and for the relief of insolvent debtors,” it is enacted, that “No writ of *fiery facias*, or other writ of execution shall bind the property of the goods against which such writ is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, coroner, or other officer to be executed; and for the better manifestation” of the time of delivery, such sheriff, &c. shall indorse on such writ “the day of the month and year when he received the same.” [Clay's Dig. 208, § 41.] This statute, it has been often said, gives to a *fiery facias*, a lien upon the goods and chattels of the defendant, that may be within the county, while it is operative and in the hands of the officer. And in *Hester, et al. v. Keith & Kelly*, 1 Ala. Rep. 316, it was held, that the act in requiring the indorsement of the reception of an execution, must be regarded as directory, and its non-observance by an officer in whose hands an execution is placed, cannot prejudice a plaintiff. The lien attaches as soon as the execution is received, and the noting upon it the day of the receipt, is only intended to evidence the fact; and it is competent to show the time of the delivery by extrinsic proof.

Where the lien of a *fiery facias* attaches upon goods and chattels, it will not be lost by their removal to another county—not even in favor of a junior *fi. fa.* issued to the latter county, if an *alias* execution has regularly issued as directed by the act of 1828. [*Hill v. Slaughter*, 7 Ala. Rep. 632; See also, 2 Murph. Rep. 353; 2 Hawks' Rep. 341.]

A lien, it is said, is neither a *jus ad rem*, nor a *jus in re*, it only confers a right to levy the *fi. fa.* on the particular

chattel to the exclusion of other adverse interests arising subsequent to the lien's attaching ; and when the levy is actually made, it operates retrospectively, so as to cut off intermediate incumbrances. [Meany v. Head, 1 Mason's Rep. 319; Conard v. Atlantic Ins. Co. 1 Pet. Rep. 386 ; Jones v. Jones, 1 Bland's Rep. 448 ; Arnold v. Bell, 1 Hayw. Rep. 396 ; Ingles v. Donaldson, 2 Id. 57 ; Williams' adm'r v. Bradley, Id. 363 ; Payne v. Drew, 4 East's Rep. 523 ; 1 Smith's R. 170.] A lien is a tie, hold, or security, upon goods which a man has for some particular purpose—he may hold it until the purpose is satisfied, or the lien is lost, or in some manner waived. [United States v. Barney, 2 Hall's Law Jour. 128.] The prior lien is entitled to prior satisfaction, unless it be intrinsically defective, or displaced by some act of the party holding it, which shall postpone him at law or in equity ; and mere delay, it is said, is not sufficient for that purpose. [Rankin v. Scott, 12 Wheat. Rep. 507 ; see also, 3 Harrington's Rep. 37 ; 4 Harrison's Rep. 166.]

In South-Carolina it has been held, that executions bind the property throughout the State, from the time they are entered in the sheriff's office. Yet the plaintiff may lose his priority by delay. [Woodward v. Hill, 3 McC. Rep. 241,] So, in Porter v. Cocke, Peck's Rep. 30, it was decided that although a judgment was a lien upon the lands of the defendant, this lien may be lost ; and a contract to stay execution until the next term will suspend it with regard to other judgment creditors. [See also, 4 Dall. Rep. 450 ; 1 Watt's R. 9.]

Whether the stern principles of law or international comity require one country to recognize the preferences or priorities of creditors in another, as established by the legislation of the latter, is perhaps a question about which foreign jurists are not fully agreed. But it may be stated as the result of the doctrine taught by most of them, that the proper *forum* to decide upon all questions of the preferences and priorities of creditors, is the place of the domicile of the debtor ; and that the law of that place, and not the law of the place of the contract, is to govern in all cases of such priorities and preferences, in respect to moveables situated in his place of domicile. But as to moveables situate elsewhere, as well as to immoveables, the *lex rei sitae* is to govern. A preference

arising solely from the authority of the law, has no effect upon property not subjected to the law maker, when the controversy respects the interest of third persons, or of other creditors, who have not contracted in the place, the laws of which give the preference. [Story's Confl. of Laws, 270.] Again, whenever the *lex loci contractus* and the *lex fori* as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land. *In tali conflictu magis est, ut jus nostrum, quam jus aliorum servemus.* [2 Kent's Com. Lect. 39.]

Upon the general principles as to the operation of contracts, and the rule that moveables have no locality, it is said that the privilege, hypothecations and liens of creditors ought to prevail over the rights of subsequent purchasers and creditors in every other country. That having once attached rightfully *in rem*, they ought not to be displaced by the mere change of local situation of the property. [Story's Confl. of Laws, 335, § 402.]

The principles we have stated as sustained by judicial decisions, or the opinions of elementary writers, furnish the most apt analogies for the decision of the case at bar of any we have been able to find. From these it follows, that the delivery of a *fi. facias* to the sheriff, does not invest the plaintiff in execution with a right to the personal property of the defendant, against which it is sued forth. It merely gives to the plaintiff a lien paramount to all junior execution creditors, if it is promptly enforced, and if the debtor incumbers or sells it, the incumbrancer or purchaser will take it subject to the lien.

We have seen that the removal of chattels from one county to another, will not deprive a party of the lien of an execution which attached in the former, if an *alias fi. fa.* has regularly issued as directed by the statute of 1828. This statute adjusts the priorities of execution creditors, and declares, that "if a term shall not have elapsed, and an *alias* shall be delivered to the sheriff before the sale of property under a junior execution in favor of another creditor, the lien shall continue, notwithstanding the *alias* may not have been delivered until after such junior execution; but if such *alias* shall not be delivered until after the sale under such junior

execution, the lien of the latter shall prevail." This diligence, it will be observed, is necessary to keep alive the lien, where there are other creditors who are seeking to subject the debtor's estate to the satisfaction of their executions. But after the lien has once attached, the plaintiff cannot be required to employ the same diligence in order to continue it against the defendant, or a purchaser from him. In *Claggett v. Foree*, 1 Dana's Rep. 428, it was held that the temporary removal of property would not free it from a lien which had been acquired by the delivery of a *fi. fa.* to the sheriff. If without connivance or fault on the part of the plaintiff in execution, the defendant removes his goods from the State, the lien would be suspended during the time they were abroad, but upon their being brought within it again, either by the defendant or a purchaser from him, the lien would revive and relate back to the time when it first attached. This conclusion seems to result from the proposition that it cannot be lost without fault on the part of the plaintiff, or unless there be such a want of diligence as gives a preference to a junior execution. The fact that the property had been sold while it was abroad, by the defendant, cannot destroy the lien; for he has no right to make an unincumbered title to it while the execution remains unsatisfied, and its lien unimpaired.

As there is not even *jus ad rem*, perhaps the property could not be pursued into a foreign jurisdiction; to authorize proceedings there, it is possible that there should be a levy, which gives *jus in re*. But however this may be, the conclusion we have expressed will not be affected. If a sale was made abroad, under judicial process against the defendant in execution, we incline to think that the title of the purchaser under that process would prevail against the lien of the *fi. fa.*, if the property was removed into this State. But this would depend upon the effect of the foreign law, and would be altogether different in principle from the case of a voluntary sale. So if the property should remain abroad a sufficient length of time for the statute of limitations to bar an action of detinue, it is quite probable that the purchaser from the defendant might invoke the statute, and thus defend his ti-

tle. But the case of the claimant, as presented by the record, is unassisted by any of these circumstances, which it is intimated might possibly defeat the plaintiff's lien. It presents the naked question, whether, if a lien attaches upon chattels, in virtue of a *fi. fa.*, and they are removed from the State and sold by the debtor, and afterwards brought into the State, can they be seized and sold under an *alias fi. fa.* issued under the same judgment, so as to defeat the title of the foreign purchaser. Upon this point our opinion has been expressed. The judgment is consequently reversed, and the cause remanded.

GOODGAME v. COLE & CO.

1. When the question involved is fraud, the vendee may show that he was advised by a third person to come to this State for the purpose of securing a debt from the vendor, and that he came for that purpose. His purpose in coming is a part of the *res gestae*.
2. Admissions by the vendor that he was indebted to the vendee, if made at a time previous to contracting the debt with the attaching creditor, are admissible, it being shown the consideration of the sale was notes due from the vendor to the vendee.
3. Admissions made by the vendor at the time of the sale, that he was indebted to the vendee, are admissible as part of the transaction; but as proof of consideration, such admissions are entitled to no weight, if the creditor's debt was existing at the time of the sale. If the evidence creates a suspicion of the fairness of the transaction, it is incumbent on the vendee to prove the payment of an adequate consideration.
4. Declarations made by a vendor remaining in possession of slaves, after the period when, by the ordinary course of trade, they should have passed to the possession of the vendee, are admissible as evidence on the ground that, from this circumstance, a fraudulent combination between them might be inferred.

Writ of Error to the Circuit Court of Dallas.

CLAIM to certain horses, slaves and cotton levied on by *fi. fa.* at the suit of Cole & Co. against Wm. B. Goodgame.

1. At the trial, it was in evidence that Wm. B. Goodgame, the defendant in execution, in the year 1835, was appointed guardian for George H. Goodgame, the claimant, he being then a minor. In April, 1844, some two or three years after George H. had attained his majority, there was a sale of the slaves, levied on by this execution to the claimant—the consideration expressed in the bill of sale was \$1200, and the subscribing witness stated that notes for that sum, bearing date 27th March, 1842, 1st May, 1842, and 1st March, 1843, were given up by George H. to W. B. Goodgame. There was also evidence tending to show, that at the death of the father of George H., some property was left, to which his son was entitled to a distributive share, but it was not made to appear whether it came to the possession of his said guardian, or whether there was any indebtedness from the said guardian to his ward at the time of the sale. There was also evidence from the plaintiff, tending to show that this sale was fraudulent. The subscribing witness to the bill of sale having proved its execution, and identified the notes given by the claimant for the price, the claimant then proved by this witness, that early in 1844, he went to the State of Georgia, where he saw Goodgame, the claimant, and in consequence of what the witness had heard in Alabama, advised him to return with the witness, and endeavor to secure his indebtedness against the defendant in execution. That George H. did return with the witness for that purpose, and in a few days after reaching here, the purchase was made as before stated. The plaintiff objected to this evidence, and the court excluded it, except that the claimant did come from Georgia about that time, and that he did make the purchase, as stated.

2. The claimant also offered to show by the same witness, that two years previous to the sale, Wm. B. Goodgame admitted to him he was indebted to the claimant. This was also excluded.

3. The claimant also offered to prove by this witness, the declarations of the defendant prior to the sale, and whilst he

was in possession of the property, in regard to his indebtedness to claimant. This was also excluded.

4. The claimant also offered to prove by this witness, that at the time of making the sale, the defendant in execution stated the notes had been given on account of his indebtedness to the claimant as his guardian. This was also excluded.

5. It also appeared in evidence, that at the time of the sale, Wm. B. Goodgame was a tavern keeper in Cahawba, and that George H. boarded with him, and continued to board there to the end of the year 1844. That early in 1845, both the Goodgames went together to a farm in the country, and both worked and carried on said farm. That the slaves in controversy also worked there. During 1844, said slaves were kept as servants about the tavern, and Wm. B. Goodgame appeared to control them. The plaintiff in execution produced a witness, who testified that in 1844, after the said sale, and while the slaves were employed in the tavern, said Wm. B. claimed and spoke of the slaves as his own property, and said as to one of them, if he were to sell him he should ask a very high price. It did not appear the claimant was then present, or knew of this claim by Wm. B. This was admitted against the objection of the claimant.

The claimant excepted to these several rulings of the court, and they are now assigned as error.

EVANS, for the plaintiff in error, insisted—

1. That all the evidence offered by the claimant was admissible as part of the transaction of sale, and as tending to explain its circumstances. [Greenl. Ev. § 108, 109; Powell v. Olds, 7 Ala. Rep. 652; 9 Ib. 861; McBride v. Thompson, 8 Ib. 650; Yarborough v. Moss, 9 Ib. 382; Downman v. Frow, 6 Ib. 879.]

2. Declarations of a party, *ante lite motem*, and against his interest at the time, are admissible. [Greenl. Ev. § 147, 148, 149, 181, 153.]

3. The general rule is, that declarations of the vendor are not admissible against his vendee, and there seems nothing in the circumstances of the case to withdraw it from the rule. [Hard v. West, 7 Cowen, 752; Whitaker v. Brown, 8 Wend.

490; Talcot v. Wilcox, 9 Conn. 134; Cowan & Hill's Notes, 602.]

PECK, contra, cited McBride v. Thompson, 8 Ala. R. 653; Gary v. Terrell, 9 Ib. 206.

GOLDTHWAITE, J.—1. It is possible most of the questions presented on this record might have been otherwise ruled, without affecting the result; but this is no reason against their revision here, as it is impossible to say what influence the rejected testimony might have had with the jury. It has been well said, the affairs of men consist of a complication of circumstances so intimately interwoven, as to be hardly separable from each other. Each owes its birth to some preceding circumstances, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and its kindred facts materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances may always be shown to the jury along with the principal fact. [Greenl. Ev. § 108.] In every transaction where fraud is imputed, it must be conceded to be of essential importance the jury should be put in possession of every fact and circumstance tending to elucidate the question. It is impossible to say the same conclusion would arise in the mind of any one, of the validity of a transaction carried on by parties secretly and without any known motive, and one which was transacted at the instance, or on the advice of another. In this view, the fact that the claimant was advised by the witness to come to this State for the purpose of securing a debt, is a circumstance bearing upon a sale recently made, in connexion with that avowed object. It is entirely distinct from proof that the one party was indebted to the other, and did not tend to establish that fact: but when a consideration was otherwise made to appear, would certainly be admissible to show, in some degree at least, that the object of the journey to this State was not to take a pretended conveyance.

2. The question next in order, has become one of considerable importance, as affecting the general practice, since the

enactment of the statute by which defendants in execution are excluded as witnesses in claim suits. As this source of evidence is cut off, it is evident that cases may arise in which there may be great difficulty in showing the consideration for sales of property made by a debtor to a stranger, yet this difficulty cannot effect a change of established rules. It has several times been held in this court, that the recitals in the deed made by the debtor, or admissions by him at the time of its execution, were not evidence. [McCain v. Wood, 4 Ala. Rep. 258; Branch Bank v. Kinney, 5 Ib. 9.] In the first of these cases, the rule is stated with reference to a deed, and admissions *made after* the accruing of the debt to the creditor contesting the deed, and in the last we presume the same condition of facts existed, although not stated in the report of the case. The objection to such evidence is said to be, that it can at any time be manufactured by one indebted, and by means of it a creditor might be defeated, as it would in most cases be impracticable to prove a negative, or disprove what the debtor asserted as the consideration. It is very possible the rule is confined to declarations and admissions *made after the creation* of the contesting creditor's debt, as until then, there is no reason why even a voluntary conveyance may not be good. Indeed, such seems to be the settled practice of the English courts, when it becomes necessary to prove the debt due to the petitioning creditor, in a suit by the assignees of a bankrupt. In such a suit, the bankrupt is not a competent witness, (Chapman v. Gardner, 2 H. B. 279); yet his admissions of indebtedness, *made before* the act of bankruptcy, may be given in evidence, though they cannot be if *made after* the act. [Smallcombe v. Watts, 13 Price, 131; see also Greenl. Ev. § 181.] This seems to be the precise principle which is adverted to in McCain v. Wood, *before cited*, and will let in as evidence admissions made by the debtor prior to the creation of the debt, which the attaching creditor is seeking to enforce against his assignee or grantee. What weight such admissions would be entitled to in the minds of the jury, it is evident would depend on the circumstances of the case, but in principle they seem to be admissible, if made by the debtor at a period of

time when it is not his interest to make them, and when they cannot affect the creditor, against whom they are afterwards used. It will thus be seen, the test of the admissibility of such admissions, is not the length of time previous to the trial, but that it is the fact whether at the time the debtor had an interest in creating a title in another to defeat the particular creditor. Whether the fact of a similar interest to defeat some other creditor would not produce the same effect, is a matter we need not consider at this time. The same remarks apply to the other admissions offered in evidence, as having been made anterior to the supposed sale of the slaves.

3. What transpired at the sale was proper evidence on the principle first stated. It was a part of the transaction of sale, and independent of the effect it would have as proof of the consideration passing, the admission should have gone to the jury. As proving consideration, it was entitled to no weight, if the creditor's debt was existing at that time, (*McCain v. Wood*, 4 Ala. Rep. 258); and if the evidence on the part of the creditor induced a suspicion of the fairness of the transaction, it was incumbent on the claimant to prove the payment of an adequate consideration. [*Seamans v. White*, 8 Ala. Rep. 656.]

4. With reference to the proof of declarations by the vendor, when remaining in possession of the slaves after the period when, by the ordinary course of trade, they should have passed to the possession of the vendee, we think it well established they were admissible, on the ground that there was evidence from which a fraudulent transaction between the vendor and vendee might be inferred from there being no change in the possession. [*Borland v. Mayo*, 8 Ala. Rep. 105; *Cowen & Hill's Notes*, 177, and cases there cited.]

The court having erred, however, in the other particulars, the judgment is reversed, and the cause remanded.

McGEHEE v. McGEHEE.

1. When an award is about being made, between a principal and one of two sureties, touching certain moneys, alledged to have been placed in his hands for the payment of the debt, the other surety will be bound by it when made, either by assenting to it when made, or by being present with full knowledge that it is about being made, and not dissenting.

Error to the Chancery Court of Montgomery.

THE bill was filed by Albert McGehee, and Joel A. Stokes, against Abner McGehee, William McGehee, and James A. Smith. The material allegations of the bill are, that the complainant, Albert, and the defendant Abner McGehee, became the sureties of Wm. McGehee, in a promissory note to one Chaney, for \$790, and executed their note therefor, due 1st January, 1839. That on the 28th May, the plaintiff, Albert, became the surety of William, to one Daniel Mosely for \$312, due 1st February, 1839. That on the 19th May, 1840, the complainants, together with defendants, Abner and Smith, became the sureties of William, on a note to the Branch Bank at Montgomery, for \$1860 04, due ninety days after date, and that Smith became a co-surety with the others, upon the promise of complainant, Albert, to indemnify him against loss. That on the 18th March, 1840, complainants became the sureties of William, in a note to the Branch Bank at Montgomery, for \$500, due ninety days after date, and that complainant, Albert, indemnified Stokes against loss from his suretyship.

That complainant, Albert, has been compelled to pay the debts due to Chaney and Mosely. That the latter debt had been paid to Mosely previously, by William the principal debtor, [and the receipt deposited with Abner, but of which complainant was ignorant; and that Abner received a credit for the amount so paid on a settlement of a debt of \$3,000 hereafter mentioned. That he has also paid \$151 and costs

on the note for \$500, and costs and commissions amounting to about \$100 on the note of \$1860 04.

That about the 5th November, 1840, the Montgomery Rail Road Company, was indebted to the said William McGehee in the sum of \$6,700, for work done by him for the Rail Road Company, and he being desirous to secure the complainant, Albert, and the defendant, Abner, against loss from their suretyship, deposited the claim against the rail road with said Abner, to collect, and apply the proceeds to the payment of certain debts, viz: a debt by William of about about \$3,000, to one Daniel Mosely, to which Albert, and Abner, were sureties—the debt due to Chaney—the note made by Albert and Smith for \$1860—the note for \$500 payable to the Bank at Montgomery, and a note due one Thomas Baldrick, of about \$500.

That William deposited the receipt of Abner for the said claim with complainant Albert—that he cannot produce the original, as it was handed to Abner, and not returned by him, but was destroyed, and he therefore appends to the bill a substantial copy, which, after reciting the claim against the rail road proceeds—Rec'd, 5 Nov'r, 1840, of William McGehee, the above demands, which I promise to collect, and pay the following notes, and executions, viz:

Daniel Mosely,	\$3,000
John Chaney,	900
T. Baldrick,	500
Bank,	2,300

\$6,700

That when Abner received the said claim, he knew complainant was the surety of William, and received it for the purpose of indemnifying him against loss, on account of his suretyship, and of discharging the debts specified.

That Abner McGehee being indebted to the rail road, applied the claim placed in his hands in discharge of his own debt, and received a credit for the amount, and has only paid on account of the debts due by William, about \$2,600, with interest on the note of \$3,600 due Mosely, the balance of the debt being paid by William to Mosely—the debt due Baldrick, and that to the bank, leaving in the hands of Ab-

ner a sum sufficient to pay complainant, Albert, the amount which he has paid as the surety of William. That William is insolvent, and a non-resident, &c.

Abner McGehee answers, and admits that he and Albert were sureties for William, to Chaney, as stated in the bill, and that it was paid by Albert. Denies all knowledge of the suretyship of Albert for the debt to Mosely of \$312, or of the debt of \$500 to the Bank of Montgomery, but as to the latter says, he understood, both from Albert and William, that they were jointly interested in it; and as to the former, denies that any receipt for the money, as charged in the bill, was ever deposited with him, and knows nothing of its payment, either by Albert or William. Has no knowledge of the payment of \$151, or of the cost alledged to be paid on the note of \$1860; that he himself has paid the debt, interest and costs, and holds a receipt for the same.

Admits that he received a credit with the rail road, for the full amount of the claim of William McGehee, which he admits was deposited with him for the purpose described in the receipt exhibited to the bill, and which he admits to be a correct copy—but denies, that the debt of \$500 due the bank was to be paid out of this fund, or that any debt was to be paid out of this fund, except those on which himself and Albert were co-sureties, as appears by the receipt itself.

He further states, that the company were embarrassed and unable to pay their debts, and proposed to their creditors to issue stock to them in payment, which he, as the agent of William, received for him in good faith, holding himself responsible, if he was dissatisfied with it, to furnish him claims against the company to the amount of his claims, or to pay him the par value of the stock in money. He made these offers to William, who not being satisfied therewith, it was agreed between him and William, to submit the matter to arbitration, and bonds were executed accordingly, to abide by the award, by William and himself. That the arbitrators appointed a day for the settlement, and respondent, Wm. and Albert McGehee, attended, and after a full hearing, they made their award in writing, in the presence, and with the full knowledge, of complainant, and that W. McGehee acquiesced in said award, and actually received the balance found to be due. The award and receipt are made exhibits to the bill,

and he insists this was a fair, just and impartial settlement of these matters, and that they are no longer open to controversy.

He further states, that at the time of the award, the debt due Thomas Baldrick was not considered by the referees, for want of the necessary testimony, and that after the award, William and himself met and settled this matter, and Wm. then executed his note to him for the amount he had paid Baldrick, \$890, due the first January, 1845, and that since the award, and since he received the note from William, he had paid the debt due the bank, being the same for which complainant is liable as co-security, and insists that he is entitled to a decree for contribution against him.

Such of the proof as is important, will be found in the opinion of the court.

The chancellor considered the award as equally binding on the complainant, as on William McGehee, and dismissed the bill. This is now assigned as error.

ELMORE, for plaintiff in error.

1. The complainant is not bound by the award between defendant and William McGehee—1. Because he was no party to it. 2. Because he did not consent to it. 3. Because his acts and declarations before the arbitrators show that his rights were not intended to be submitted, and were not submitted. 4. Because the submission was upon a false representation by Abner McGehee, of the disposition made by him of the fund placed in his hands by Wm. McGehee. [Lamb v. Clark, 5 Pick. 193; Nichols v. Arnold. 8 Pick. 172.]

2. The proof showed the payment by complainant of various debts in which he and defendant were jointly liable as sureties for William McGehee, and that the principal was insolvent.

J. D. F. WILLIAMS, contra.

1. An award extinguishes the original demand, and is a bar to every action on such demand. [3 Phil. on Ev. 1026, and cases there cited.]

2. The assignee of a bond has a right to submit any question of defence arising thereon, on the part of the maker, to

arbitration; and their award will be conclusive against the assignor. [Scales v. Wilson, 9 Leigh, 473.]

3. Abner McGehee, as appears by his answer has fully accounted for the collaterals, placed in his hands by Wm. M. McGehee.

ORMOND, J.—The award made on the submission, entered into between Abner and William McGehee, is not impeached, and appears to be unimpeachable, and is, as between them, conclusive upon the matters submitted, and determined by the arbitrators. Is it also binding on Albert McGehee? It appears that Abner, and Albert McGehee, were co-sureties of William McGehee, and that the latter for their indemnity, placed in the hands of Abner, certain claims which he held upon the Montgomery Rail Road Company, who executed a receipt for them to William, and promised to collect the demands, and pay certain specific liabilities, being those for which Albert, and Abner, were his co-sureties. This receipt was deposited with Albert McGehee. It appears to us, that whether William, and Abner, could have submitted this matter to arbitration, without the assent of Albert, (a point not necessary to be decided,) it is very clear, that he is bound by an award, made with his knowledge, at the making of which he was present, and to the making of which he did not dissent. This results necessarily from the fact, that if the arbitrators had awarded that Abner McGehee was responsible for the nominal amount of the claims put in his hands, it would have been a fund for the discharge of the debts of William McGehee, for which he, as co-surety with Abner McGehee, was responsible. If therefore he did not intend, that the award should conclude his rights, as to the value of the fund placed in the hands of Abner McGehee, it was his duty to make known his dissent. It would be most inequitable, that he should be permitted to await the result, and take the benefit of it, or repudiate it as might best comport with his interest. The testimony is full to the point, that he was present aiding, and assisting, William McGehee in collecting testimony to lay before the arbitrators; was present at all the submissions, and when the award was made.

That he could have insisted on the award if it had been beneficial, we consider perfectly clear, as an award in favor of the principal debtor, and requiring one of the sureties to pay the debt from funds derived from the principal debtor, must by extinguishing the debt, enure to the benefit of the other surety. It is well settled, that although strangers to an award are not concluded by it, and therefore can derive no benefit from it, privies in estate may. It has been held, that an award between a vendor, and a claimant of the property, was available to the vendee, in a suit by the same claimant against him, for the same property. [Evans v. McKinny, Litt. Sel. Cases, 262. See the general doctrine and the authorities in Watson on Awards, 175.]

But it is not necessary to rest this case, on the mere omission of the complainant to dissent from the award, which he knew was about to be made, because we think the evidence shows very satisfactorily, that he consented it should be made. Mr. Bugbee, one of the arbitrators, who was examined as a witness, says, "Albert McGehee was present at the several submissions, as the friend of William McGehee as I understood, and did consent to the said submissions." In answer to the next question, he says, "Albert G. McGehee submitted no matter of his own to us, but during the investigation, he wished us to consider his interest, which was declined. I stated to him, as arbitrator, that we as arbitrators, had nothing to do with the matter between him, and Abner McGehee. That our award could not in any wise affect him, that his case was not before us, and we could not take it into consideration."

In answer to the second cross interrogatory, he says, "During the investigation, and acting upon the matter submitted, Albert McGehee was frequently present. He did not object to the submission, or to the arbitrators acting upon the matters submitted. He wished his rights to be considered, but having been told that could not be done, he did not persist."

It is quite clear from this, that the complainant was willing the matter submitted should be arbitrated, as it appears he *consented to the submission*. He wished the arbitrators also to consider the matters in difference between him, and Abner McGehee; this they refused, and upon being told that the

award would not bind him in that particular, submitted. It is impossible, that this proposition of the complainant, to consider of matters between him, and Abner McGehee, could relate to the matter submitted, which was whether Abner was to account for the claims put in his hands, at their nominal, or actual value, because in this matter his interest was precisely the same as that of William McGehee. The other matters he wished them to consider of, were doubtless those set forth in this bill; whether the funds in the hands of Abner, was to be appropriated in payment of the debts of William McGehee, for which Albert alone was bound as surety, as well as those, for which he and Abner were joint sureties. This the arbitrators very properly refused, as not within the submission. Be these matters, which he wished them to consider, what they may, it is certain they did not connect themselves with the matter submitted, as the witness explicitly states, that *he did not object to the arbitrators acting upon the matter submitted, but consented to the submission*. That his consent to the settlement of this question, by the arbitrators, would bind him, there can be no doubt. It would in effect be a parol submission of the matters in controversy. Such a consent would bind even a stranger to the award. [Kingston v. Phelps, Peake, 227.]

The award ascertained, that Abner McGehee was liable only for the actual value of the Rail Road demands, which was settled at fifty cents in the dollar. It also determined, that Abner McGehee had paid out the entire amount, except a small sum, in discharge of the debts, for the payment of which it was placed in his hands. It also appears from the record, that Abner McGehee has paid with his own funds, a much larger amount of the debts of William McGehee, for which he and the complainant were jointly bound as co-sureties, than the complainant, and the result is, that the decree of the chancellor dismissing the bill, must be affirmed.

MILLS & CO. v. STEWART.

1. A plea is bad on demurrer, which assumes to answer the entire declaration, and to furnish a bar to the action, and alleges matter which is an answer to only a part of the demand.
2. A plea, alledging that the defendant had been garuisheed in a court of the state of Louisiana, and a judgment rendered against him on his answer, condemning the debt in favor of a creditor of the plaintiff, setting out the proceedings fully, and alledging that they were conducted according to the law of Louisiana, and that he had paid, and satisfied the judgment so rendered, is good. It is not necessary in such a plea to alledge, *in totidem verbis*, that the defendant had no notice of the transfer of the note, when he answered the garnishment.
3. When the record of the proceedings of one state, are offered in evidence in another, authenticated pursuant to the act of congress, presumptions must be indulged favorable to its jurisdiction, where the form of the proceedings do not indicate, that it is a court of limited jurisdiction.
4. A negotiable note, not endorsed before its maturity, may be the subject of an attachment, or garnishment, at the suit of the creditors of the payee, so long as he remains its proprietor, or until the maker has notice of the transfer, if indorsed when past due.
5. A statement made by the clerk of the court rendering the judgment, of its amount, and payment by the garnishee, though certified as part of the record, is not evidence of the fact of payment.
6. A garnishee against whom a regular judgment has been rendered, may discharge it by payment, without waiting until he is coerced by execution.

Writ of Error to the County Court of Mobile.

THIS was an action of assumpsit, at the suit of the plaintiffs in error, on a promissory note, by which the defendant, on the 28th December, 1843, promised to pay to George G. Henry, or bearer, at the Bank of Mobile, on the 1st March, 1845, the sum of seventeen hundred and ninety-three 22-100 dollars. The note was indorsed and delivered by the payee to the plaintiffs.

Among other pleas, the defendant pleaded, that on the 31st March, 1845, Messrs. Perkins, Hopkins & White, of New-

York, instituted proceedings in the commercial court of New-Orleans, against Geo. G. Henry as their debtor, alledging that the defendant was indebted to him, &c., and praying that he might be made a party to the suit; thereupon, such proceedings were had that the debt was attached, and the defendant summoned to answer upon oath, as to his indebtedness, &c. : whereupon, he answered, that he was indebted to Henry the balance due on a promissory note, &c., the sum of one thousand dollars, deducting therefrom twenty-five dollars, which by the laws of Alabama, bore interest from the 1st March, 1845, when it became due, at the rate of eight *per cent. per annum*. On this answer the court rendered judgment in favor of Messrs. Perkins, Hopkins & White, for the sum of sixteen hundred and fifty-nine 72-100 dollars, with interest till paid, and costs of suit; and it was further considered, that the plaintiffs in that suit recover of this defendant the sum of nine hundred and seventy-five dollars, with interest thereon, making the aggregate sum of \$1,054 12. This amount was paid by defendant on the 10th day of March, 1846, in full satisfaction of the judgment against him. Defendant avers that the judgment so rendered against him was for the same identical cause of action in the plaintiff's declaration mentioned—which will more fully and at large appear by the records and proceedings remaining in the commercial court of New-Orleans, in full force and effect, not in the least reversed or annulled, &c. And this the defendant is ready to verify, &c. The plea is drawn out at great length—alleging all the proceedings to have been conducted according to the laws of Louisiana. The plaintiff demurred, and his demurrer being overruled, issue was joined upon all the pleas; whereupon the cause was submitted to a jury, who returned a verdict for the defendant, and judgment was rendered accordingly.

Upon the trial the plaintiff excepted to the ruling of the court. It was shown by the bill of exceptions that the plaintiffs produced the note with the indorsement of the payee; and on which were also indorsed credits, amounting in the aggregate, to the sum of seven hundred ninety 22-100 dollars. The defendant offered the record of the commercial court of New-Orleans, described in his plea, which was ad-

mitted in despite of the plaintiff's objection, as evidence of the existence of the judgment, but not of the facts on which it was rendered. The identity of the note declared on, and that referred to in the record, was admitted.

It was proved that the plaintiffs reside in Massachusetts, and remitted the note to their attorney for collection about the 1st May, 1845. The time of the indorsement of the note to the plaintiffs was not proved. The defendant and Henry have resided in Mobile ever since the note bears date. The payments indorsed on the note were in the hand-writing of the latter. There was no other proof of the satisfaction of the judgment against the defendant than what accompanies the record.

The plaintiffs excepted to the admission of the evidence, and the second charge to the jury. The bill of exceptions is so framed that it is not entirely easy to determine which is the second charge, but it is embraced in the following: If defendant answered the garnishment truly, and a correct judgment was rendered on the answer, and this has been satisfied by payment, then he has a good defence. Again: there was nothing to show that the garnishment was erroneous, and it must be presumed that the court in New-Orleans proceeded according to law. Whether the answer was sufficient to have authorized a judgment against the garnishee, must be determined by the law of Louisiana, instead of that of Alabama. *Further*, it was not necessary that the payment should have been made under execution—it is sufficient if the judgment was such as authorized an execution to issue when it was satisfied—and this it appears from the record, was the case.

E. W. PECK, for the plaintiffs in error. 1. The plaintiffs demurrer to the defendants' fourth plea should have been sustained. 1. Because the plea does not state that the defendant had no notice of the transfer of the note before he answered to the garnishment. [Mankin v. Chandler, 2 Brock. 125.] 2. It does not state that the entire debt sought to be recovered by the plaintiff, had been attached. [Crawford v. Clute & Mead, 7 Ala. 160.] 3. It does not aver that the commercial court of New Orleans had jurisdiction to sum-

mon the defendant, to compel him to appear and answer, or to give judgment against him, &c. [7 Ala. *supra*.] 4. It does not aver that he was compelled to pay the judgment rendered against him by the commercial court. [Cook v. Field, 3 Ala. 56.] 5. The plea does not set out the proceedings in the attachment suit, nor show that all the requirements of the law had been complied with. [Crawford v. Slade, adm'r, 9 Ala. 891, and cases there cited.]

2. The record of the proceedings and judgment in the commercial court of New Orleans, should have been rejected. 1. Because it was not shown that the proceedings were authorized by the laws of Louisiana. 2. Because on its face it shows that the judgment was erroneous, and should have been resisted by the defendant. The defendant in his answer, states that Henry, the debtor, had told him once or twice that he had transferred the note, &c. This fact being disclosed, no judgment should have been rendered against him. [Smith v. Chapman & Brother, 6 Porter, 370, and cases cited.] 3. The note being negotiable was not the subject of garnishment process. [Sheets v. Glover, 14 Louisiana R. 452.]

3. The court erred in the following charges: 1. In charging the jury that they were bound to conclude that the court which rendered the judgment acted correctly. 2. In charging the jury that it was not necessary the payment should have been made under execution, that it was sufficient if the judgment was such that an execution could have issued at the time of the payment, *which appeared to have been the case*. The error in this charge is, 1. That it instructed the jury as though payment of the judgment had been proved, when there was no evidence of that fact. 2. In charging that it appeared that an execution could have been issued on the judgment, without proof how such judgments were enforced by the laws of Louisiana. 3. In charging the jury, that in the opinion of the court the judgment was a valid judgment of Louisiana; without there being any evidence what those laws were. 4. The court erred in charging the jury that they were at liberty to examine the answer of the garnishee, and to give it credence if consistent in itself, and not contradicted by evidence.

Lockwood, for the defendant. 1. The demurrers to the fourth and fifth pleas were properly overruled. [Hitt v. Lacy, 3 Ala. 104.] 2. It is true, the plaintiffs' replication to defendants' fourth plea, contains the words "*nul tiel record*," which of itself is properly determinable by the court, but the same replication includes a distinct fact, which is only determinable by the jury; the replication is double, and issue is taken on it and submitted to the jury. But there is such a record, and judgment by the court would have been for the defendant. Even if it were error to submit the question as to the record to the jury, still it would not be decisive of this case. The judgment on the said record by the court, either for plaintiff or defendant, would not be a ground of reversal, inasmuch as the recovery of a debt sued for by a previous garnishment may be given in evidence under the general issue—which was the fact in this case. [Cook, Adm'r, v. Field, et al. 3 Ala. 54; McDaniel, et al. v. Hughes, 3 East. 366.] 3. The payment by a garnishee of a foreign judgment and execution is a bar to a further recovery.—[Holmes v. Remson, 4 John. Ch. R. 460; 2 Kent's Com. 119; 4 Cow. R. 521; 20 Johns. Rep. 229; 1 Porter's Rep. 198; 2 Starkie, 707; Story's Conf. L. 462-3.]

COLLIER, C. J.—If a plea commence as an answer to the whole declaration, and in truth the matter pleaded is only an answer to part, the whole plea is bad, and the plaintiff may demur; but if it begin as an answer to part, it is deemed an answer to that part only, although it may contain a legal defence to the whole declaration. So it is said, that if a plea begin only as an answer to part, and is in truth but an answer to part, the plaintiff cannot demur, but must take his judgment for the part unanswered as by *nil dicit*; and if he demur or plead over, the whole action is discontinued. [1 Chit. Pl. 509; Arch. Civ. Pl. 168, 173.] In the case before us, the plea objected to assumes to answer the entire declaration and to furnish a bar to the action, while it merely alleges the payment of the note in part, under the sanction of a judgment against the defendant, at the suit of the payee's creditors, in another State, for the amount thus paid; shows that when called on to answer that suit, he admitted an indebted-

edness upon the note for nine hundred and seventy-five dollars, with interest from the time of its maturity, for which the judgment was rendered ; but does not state that the residue of his note to Henry had been paid. It cannot, according to any rule of pleading be intended that the defendant had previously paid the difference between the amount of the judgment, and the sum expressed upon the face of the note. For this difference, amounting to more than eight hundred dollars, the plea does not set out any legal objection to the plaintiffs' recovery, and the demurrer should therefore have been sustained for this defect.

It is no objection to the plea, that it does not alledge *in totidem verbis*, that the defendant had no notice of the transfer of the note, before he answered the garnishment in the commercial court of New Orleans—he affirms in his answer an indebtedness to Henry, which he could not have declared consistently with truth, if he had been informed that another person had become the proprietor of the note. If he had notice, the plaintiff should have replied the fact, and establish it. It is matter of affirmation which it devolves upon the plaintiff to prove—the defendant cannot be required to disprove it, this would be to throw on him the burthen of making out a negative before any evidence was adduced from which the affirmative could be implied.

Where the record of the proceedings of one State are offered in evidence, authenticated pursuant to the act of Congress, in the courts of another, presumptions must be indulged favorable to its jurisdiction ; especially where the form of the proceedings does not indicate that it is a court of limited powers. If, in point of fact, the tribunal of the sister State had no jurisdiction either of the subject matter or the parties, it was competent for the plaintiff to have replied to it, and put the matter in issue. [Lucas v. The Bank of Darien, 2 Stewt. Rep. 280 ; Miller v. Pennington, Id. 399. See also Martin v. Nicholls, 3 Sim. Rep. 545 ; Hopkins v. Lee, 6 Wheat. Rep. 100 ; Mayhew v. Thatcher, 6 Wheat. R. 129 ; Field v. Gibbs, 1 Pet. C. C. Rep. 166 ; Shumway v. Stillman, 6 Wend. R. 447 ; Taylor v. Phelps, 1 Gill & Johns. Rep. 492 ; McElmoyle v. Cohen's Heirs, 13 Peters' Rep. 312 ; Hampton v. McConnell, 3 Wheaton's Rep. 234.] But it

must be intended, in the absence of extrinsic proof, or any thing in the record impugning the regularity of the proceeding, that the court had jurisdiction of the matter adjudicated, and that the judgment was authorized by the facts and evidence upon which it was rendered. [Hughes v. Morris, 2 Ala. Rep. 269; Kennedy v. Kennedy's Adm'r, 8 Ala. Rep. 391; Crawford v. Clute & Mead, 7 Ala. Rep. 157, and Crawford v. Slade, Adm'r, 9 Id. 887, are altogether inapplicable.] In these cases the defendant pleaded the pendency of an attachment in the circuit court of the United States, at the suit of creditors of the plaintiff, in which the debt sought to be recovered had been attached by service of garnishment on him (defendant). This court held, that such plea must aver all the facts necessary to give the court jurisdiction in which the suit is pending; whether the whole or what part of the debt had been attached. In these cases the garnishments, though pending in a federal court, were influenced in its proceeding by the legislation of this State in respect to attachments and garnishee process; and it was deemed essential to the defence to show, that, that tribunal was so proceeding as to vindicate its jurisdiction. [See cases cited in 3 Kinne L. Comp. 10.] But in the case at bar, the suit was instituted and prosecuted to judgment in another State, and every presumption must be indulged favorable to its authority; more especially when it is alledged to have been proceeded in according to the laws of that State; and there is an absence of proof, either intrinsic or extrinsic, to impugn the validity or correctness of the judgment. The fact that the note was negotiable, if it was not indorsed before its maturity, would not exempt it from an attachment or garnishment, at the suit of the payee's creditors, so long as he remained its proprietor, or until the maker had notice of the transfer, if it was indorsed after it was past due.

The statement of the fact of the amount of the judgment against the defendant, its satisfaction, &c. made by the clerk of the commercial court of New Orleans, though certified as part of the record, cannot be treated as such. In the absence of proof of the laws of Louisiana making it part of the proceedings in the cause, it cannot be treated as evidence of payment. In this respect, then, the evidence was insufficient to

make out the defence, as it was necessary to show not only a judgment, but also to prove that it had been satisfied.

To have justified the defendant in making the payment of the judgment, he need not have waited until he was coerced by an execution. It is enough if there was a regular judgment which could have been enforced by execution. In the predicament of the exemplification, we have seen that it will be intended that there was such a judgment, and that the payment of the money was not gratuitous merely.

The answer of the garnishee as certified in the record from Louisiana, was certainly evidence under the restrictions laid down by the county court—in fact the law was ruled quite as favorably to the plaintiffs on this point as they were authorized to ask.

We have seen that the plea is defective, and that the demurrer to it, instead of being overruled, should have been sustained. The judgment is therefore reversed, and the cause remanded.

SHEPPARD, ET AL. V. IVERSON.

1. Equity has jurisdiction to set aside the fraudulent transfer of a debt reduced to judgment, although the party may also be entitled to a legal remedy by a garnishee process, against the fraudulent transferee.
2. When an insolvent father, pending a creditor's suit against him, transfers to his son, notes, &c. to the value of \$2200, of which \$1500 only are on solvent persons, and receives from him transfers of accounts for \$2400, of which from \$1600 to \$2000 are good, it is fair to infer a secret trust between the parties, and that the assignment by the father was made to delay, &c., the creditor suing.

Writ of Error to the Court of Chancery for the 9th District.

THIS bill is filed by Iverson against Edmund Sheppard, William P. Sheppard, and E. A. Dunn, and H. Moore. Its object is to obtain satisfaction of a judgment obtained by Iverson against Edmund Sheppard, and one Lore, by setting aside the assignment and transfer of a judgment in favor of said Sheppard, against Dunn and Moore, made by Sheppard to his son Wm. P. Sheppard, in fraud, as the bill alledges, of the complainant, and to prevent him from subjecting the debt to the payment of his judgment.

The answers of the Sheppards deny any fraud, and assert the fairness and validity of the transfer. The history of the transaction, as given by them, is this: Previous to the 19th April, 1842, the younger Sheppard was practising as a physician in the vicinity of Irwinton, and debts to the amount of some \$2400 dollars were due him on account. He was about to remove to a place in Georgia, about one hundred miles distant, and transferred them to his father in consideration of an assignment of certain demands amounting to about \$300 less than the medical accounts, and including the one sought to be made subject to the complainant by this bill. One reason assigned for the exchange is, that the accounts were due from persons scattered over the country, and difficult of collection, on account of the smallness of the sums.

The proof taken in the cause, establishes that the following demands were transferred by the elder to the younger Sheppard, as the consideration for the accounts, to wit:

An order on J. M. Moore,	\$378
A note on W. Wellborn and E. A. Dunn, for	780
“ Wm. Wellborn, for	394
“ W. S. Paullin and David Lore,	260
“ Morgan, Paullin & Hopkins,	220
“ David Lore, for	200

Amounting in all, exclusive of interest, to \$2232

The three last demands the witnesses consider as valueless, or nearly so, and judgment was recovered on that against Wellborn for only \$70. All the witnesses concur, that the

estimated value of these demands was between \$1400 and \$1560. The complainant's witnesses, two in number, assert their belief that the solvent medical accounts transferred did not exceed \$700. Those for the defendants, with equal positiveness, value the solvent demands at from \$1600 to \$2000, and are four in number. The judgment against the elder Sheppard was obtained in August, 1842, and the suit was in progress at the time of the assignment. Most of the witnesses concur, that the medical accounts were more valuable to the elder Sheppard than to any other person, from the circumstance that he kept a wharf and warehouse, and thus could engage the debtors to work out the debts.

The chancellor considered the exchange of the demands by the elder Sheppard as colorable only, and fraudulent as to complainant, and decreed accordingly.

It is now assigned that this decree is erroneous.

PECK, for the plaintiff in error.

No counsel appeared for the defendants in error.

GOLDTHWAITE, J.—1. At first, we were inclined to think, that under the case made by the bill, the complainant had an adequate remedy at law, by garnishee process, but further reflection has convinced us, that even if this remedy could be effectively pursued, it does not follow he may not also proceed in equity to set aside the fraudulent assignment, and thus reach assets which in reality belong to his debtor. Fraud is one of the original grounds upon which courts of equity have always considered themselves as entitled to entertain jurisdiction. [Daniel's Ch. Prac. 611; Story's Eq. § 184.] We conclude therefore that it is no objection to this bill, that the party might have redressed himself by pursuing his legal remedy. [See, also, *Mariott v. Givens*, 8 Ala. 694, § 4.]

2. The merits of the controversy involve no other questions than those of fact, or inferences from facts. If the transaction between the two Sheppards was to be determined alone by the supposed inadequacy of the medical accounts, the plaintiff would fail, for conceding the witnesses in his behalf assert the value of them to be but \$700, those for the

defendants are equally positive in fixing it from \$1600 to \$2000, and are double the number of those who hold the other opinion. We do not think, however, the value of the demands received by either party, a matter of much importance, except as furnishing a means by which to ascertain whether or not a secret trust is to be inferred, as between the parties. It will be seen the nominal amount of the demands on each side was much the same thing, and most probably if the interest on the notes transferred by the elder Sheppard is a subject of conjecture, (for the proof is entirely silent,) they may be assumed as equal. It is clear also, that more than \$600 of these notes were worthless. Now what reason can be assigned in a *bona fide* transaction, for the desire to acquire paper of this character? If any can be given, it certainly is not disclosed by the proof. Then again the evidence abundantly shows, that the father assisted the son in his medical practice, and the son his father in the wharf and warehouse business. It is strange, with these proper feelings between them, that the father should trade for accounts worth, according to the estimate of his own witnesses, from \$1600 to \$2000, and only allow from \$1400 to \$1560. In the ordinary transactions between such near relations, it might be supposed the father would be as willing to aid his son in the collection of these demands as to create them. It is very difficult to conceive, that in such an arrangement between those parties, there was not either an express or tacit understanding that the sum to be secured on either hand should be made equal, and when it appears to have been made a short time only before the debtor's capacity to assign might have been affected by garnishee process, and when the debtor was actually insolvent, the reasonable conclusion is, the transfer was intended, not to advance the interest of the son, but to defeat the father's creditor.

We think the chancellor took the proper view of the evidence. Decree affirmed.

GRIMSHAW AND BROWN v. WALKER.

1. An assignment by an insolvent, conveying all his property to trustees, and giving preferences to certain creditors, and directing first, the payment of certain preferred creditors, "the surplus, if any, to be appropriated to the other creditors rateably, who shall within four months execute a release of their claims, and if there be any surplus, after fulfilling all the trusts aforesaid, the same shall be paid over to the said R. L. W.," is such a stipulation, for the benefit of the debtor, as renders the deed fraudulent and void.
2. An improper decree of the chancellor, cannot be upheld, upon the ground, that he determined a demurrer to the bill improperly, for want of proper parties, and uncertainty.

Error to the Chancery Court of Mobile.

THE plaintiffs in error filed their bill as judgment creditors of Robert L. Walker, to set aside a deed of assignment made by him, for the benefit of certain of his creditors. The deed conveys to trustees all the real and personal estate of the grantor in trust, that as soon as convenient, they would dispose of the lands, collect the debts, &c. and from the proceeds, first to pay certain debts due and owing from Walker for cotton balances, and borrowed money, as shown in a schedule marked C. Next, a debt due the estate of Alexander J. Jude—the surplus, if any, to be appropriated to the other creditors rateably, who shall within four months from the date of the deed, execute a release of their claims, "and furthermore, if there be any surplus, after fulfilling all the trusts, aforesaid, the same shall be paid over to the said Robert L. Walker, his heirs, executors, &c."

The bill charges fraud in the making of the deed.

The defendants answered, denying all fraud, and that the deed was *bona fide*.

The chancellor considering the deed valid on its face, and there being no proof of fraud in fact, dismissed the bill; from which this writ is prosecuted.

CAMPBELL, for plaintiff in error.

W. G. JONES, contra.

ORMOND, J.—The principal question to be determined, arises upon the last clause of the deed, which it is insisted created a resulting trust in favor of the grantor, and rendered the deed void.

The law of this court, on the subject of assignments by an insolvent, is thus stated in *Ashurst v. Martin*, 9 Porter, 566 : “A debtor may convey his property in trust to pay one or more creditors in full, or to pay his creditors in unequal proportions, provided he relinquishes all control over it, and stipulates for no pecuniary interest to himself, but fairly, and *bona fide*, appropriates it to the payment of his debts.” This is again considered, and re-affirmed, in *Gazzam v. Poyntz*, 4 Ala. 379, and may be considered as the settled law of this court. See also *Hyslop v. Clark*, 14 Johns. 458; *Austin v. Bell*, 20 Id. 442; *Mackie v. Carnes*, 5 Cow. 547.

The only question, then, is, whether this assignment, being made by an insolvent, and conveying all his property to trustees, by a deed giving preferences to certain creditors, does provide for a pecuniary benefit to the grantor.

By the terms of the deed, the trustee is required, after the execution of the trusts, to pay over the surplus, if any, to the debtor. What are the trusts of the deed? First, to pay the preferred creditors. Second, such of the remaining creditors as within four months executed a release, and the residue, if any, to the debtor. It is very clear there was no authority on the part of the trustees, to pay any creditor of the second class, who did not release, but the effects, which in the event of a release are to be thus appropriated, if no such release is made, are to be paid to the debtor. If such a conveyance can be permitted, it will be in the power of an insolvent debtor, by a conveyance to a trustee, to place his property beyond the legal pursuit of his creditors—to exact from them a release, as the condition upon which they shall be permitted to participate in the property thus conveyed, and in the event of their refusal, that the property thus placed beyond their reach, shall be restored to him. This is a direct stipulation for the benefit of the debtor, and is such an invasion of the

rights of creditors, as makes the entire deed void, within the letter of the case of *Ashurst v. Martin*, *supra*. The precise question here discussed, was fully considered in that case, and it was there determined, that such a provision as this would render the deed void; but that the true meaning of that deed was, that such of the preferred creditors as refused to execute a release, were not cut off from all participation in the benefits of the assignment, but were placed in the last class, amongst whom all the residue was to be divided, and that as all the assigned effects were devoted to the payment of the creditors, there could be no resulting trust to the grantor.

This principle, as applicable to such a provision, is asserted by Chancellor Kent, in his 2 Com. § 39, where the leading authorities are collected, and examined. See also, *Burd v. Smith*, 4 Dall. 76; *Seaving v. Brinkerhoff*, 5 Johns. Ch. 332; *Harris v. Sumner*, 2 Pick. 129; *Passmore v. Eldridge*, 12 S. & R. 198.

This is not like a clause in a deed providing for the payment of all the creditors, and directing the trustee to pay the surplus, if any, to the grantor, because that would be the legal effect of the deed, if no such provision was inserted.—[*Johnson v. Cunningham*, 1 Ala. 259.] Nor is there any thing in the case of *Hindman v. Dill & Co.* 11 Ala. 689, adverse to the view we are now taking. That was not the assignment of all the effects of the debtor, but was merely the exercise of the admitted right of a debtor, to prefer one of his creditors, by a conveyance of slaves to a trustee, to be sold for the payment of the debt; and if the sale yielded a larger sum than was necessary to pay the debt, the law implied that it was to be paid over to the grantor. There was therefore no impropriety in inserting such a stipulation in the deed.

The difference between that case, and the present, is, that here all the effects of the debtor were transferred to the trustee, not absolutely for the payment of the creditors, but upon condition that they agreed to certain terms which the debtor imposed on them, and if they did not agree to these terms, then the property, or its avails, or such portion of it as was not paid to the creditors, was to be returned to the grantor. The only coercion the debtor can lawfully exercise over his

creditors, when by a general assignment he has placed his property beyond their control, by legal pursuit, is, in regard to the order of their payment. Thus he may provide, that those who release shall be preferred to those who do not, but he cannot place the property beyond the reach of his creditors, and dictate the terms on which they shall enjoy its benefits, at the peril of having it restored to him, if they do not accede to the terms imposed on them. There is in principle no difference between such a provision, and one giving to the debtor, or his trustee, the right to declare the uses, by changing the order of preference. In both cases a right is reserved by the deed, of control over the creditors. In this case, the effect of the provision is an admonition to the creditors, not provided for, that if they do not release, the property, or what is still worse, its avails will be restored to the debtor. Yet no principle is more decisively settled by the decision of this, and other courts, than that a deed of assignment to be valid, must distinctly declare the uses; and that no control, or coercion, can be reserved in the deed, to be exercised, either by the debtor or his trustee; and that no benefit can be stipulated for by the debtor. He may declare the order in which the creditors shall be paid, and may exact a release from future liability as the price of the preference; beyond this he cannot go. See this doctrine elaborated in *Gazzam v. Poyntz*, 4 Ala. 380, and cases there cited. This deed being in violation of these well established principles, is null and void.

The objection for the want of proper parties, cannot be made by the defendant in this court, as the chancellor overruled the demurrer to the bill for this cause. If the objection had been tenable, and sustained by the chancellor, the effect would not have been a dismissal of the bill, but the party would have been permitted to amend. It cannot be therefore urged here as a justification for the chancellor, in dismissing the bill for another insufficient cause.

For the same reason no objection can be made here to the bill for uncertainty, in not sufficiently describing the decree of the complainant, which is the foundation of the bill. If

the objection had not been overruled by the chancellor, the bill would have been amended.

The decree dismissing the bill must be reversed, and the cause remanded for further proceedings.

DUNHAM v. GRANT.

1. An administrator cannot sue upon a note, an asset of the estate, which he has taken payable to himself as administrator, after his removal from office, although no successor has been appointed.

Writ of Error to the Circuit Court of Dallas.

THIS was an action of assumpsit on a promissory note, by which the defendant below, on the 21st January, 1842, promised to pay twelve months thereafter, to the plaintiff, as administrator of Margaret McCord, deceased, the sum of \$682 88. The defendant pleaded—1. Non-assumpsit. 2. That the note declared on was made payable to the plaintiff, as administrator of the estate of Margaret McCord, deceased, of which he was such representative; and was at and after its execution, assets thereof in the plaintiff's hands; that the same was given in consideration of personal property of the intestate, sold by the plaintiff in his character of administrator, by virtue of an order of the orphans' court of Dallas, and was received and held by him in that character, and not otherwise. It is then alledged, that afterwards, and before the commencement of this action, the plaintiff's letters of administration on the estate, and his authority as administrator, were by the court from which he derived his appointment revoked and annulled, and still are revoked and annulled; that the plaintiff is not now, nor was at the commencement of this suit, the administrator of the estate of Margaret Mc-

Cord, or entitled as such, or in any other right or way to maintain an action against the defendant on the note declared on. This last plea was verified by the defendant's oath. The plaintiff demurred to the second plea, and his demurrer being sustained, the cause was submitted to the jury on the *general issue*, a verdict was returned for the plaintiff, and judgment rendered accordingly.

C. G. EDWARDS, for the plaintiff in error, insisted, that the second plea was good—it alledged facts incompatible with the plaintiff's title to the note, or right to maintain an action thereon. [Clay's Dig. 227, § 30; Minor's R. 206; 5 Port. Rep. 145; 6 Ala. Rep. 399.] The plea sets up a bar *prima facie* sufficient, and the plaintiff should have specially replied any matter of avoidance.

E. W. PECK, for the defendant in error. The payee of the note might have maintained an action thereon in his own name without describing himself as administrator. [1 Chit. Plead. 203.] If the administrator whose letters are revoked, recover, he and his sureties will be liable for the amount. [Clay's Dig. 222, § 9.] He must be allowed to recover it, or the debtor may avoid payment altogether. The cases cited for the plaintiff in error, merely determine that an administrator *de bonis non* may maintain an action upon a note or bond payable to his predecessor, if it is delivered over to him. [Minor's Rep. 206; 2 Stewt. Rep. 133; 6 Ala. Rep. 387-399.]

COLLIER, C. J.—In *Caller's Ex'rx v. Birney's Adm'rs*, Minor's Rep. 206, it was decided, that an administrator *de bonis non* could maintain an action on a writing payable to his predecessor in his representative character; that as the money when received would be assets of the intestate's estate, the right of action followed the administration. To the same effect is *King and Clarke v. Griffin, use, &c.* 6 Ala. R. 387. So it has been held that bonds and notes taken by executors and administrators for property of the estate they respectively represent, are "held by them not in their own right, but as assets in the right of others. And hence, upon their death,

resignation or removal, such notes or bonds would pass to those entrusted with the further administration, as part of the estate unadministered ;" consequently, the marriage of an obligee who was an administratrix with one of the obligors, only suspended the right of action upon the bond, which was revived in favor of an administrator *de bonis non*. [King v. Green, 2 Stewt. Rep. 133.] Green v. Foley, 2 Stewt. & P. Rep. 441, merely determines, that although the recovery of a judgment by an administrator for a debt due the intestate vests the interest in the administrator, and authorizes him to sue thereon in his own name, without noticing his representative character, yet where some of a plurality of administrators are removed from the trust after the rendition of a judgment in favor of all, an action on the judgment is properly brought in the name of the administrator who continues in office. In Cummings v. Edmondson, 5 Porter's Rep. 145, the right of an administrator *de bonis non* to sue upon a writing payable to his predecessor *eo nomine* where the money due thereon will belong to intestate's estate when collected, is recognized and supported.

In Harbin v. Levi, 6 Ala. Rep. 402, it was said, that the rights and duties of an administrator under the earlier English statutes, are very different from what they are in this State. There he was clothed with a discretionary power over the personal estate of his intestate, and when disposed of by him, either for money or on credit, the money or notes were absolutely his own. Here, however, the administrator is required by law to dispose of the assets on credit, and it is apprehended that, so long as they continue in a condition to be traced, and are not converted into money, they will pass as assets to any subsequent administrator. This, indeed, is the rule in England when the property has not been changed." In the opinion, the case of Turner v. Davies, 2 Saund. Rep. 137, is cited ; there an administrator had recovered a judgment in *trover* for the conversion of the property of his intestate, but his letters were repealed before it was satisfied. An *audita querela* was awarded at the instance of the defendant, and it was held that the removed administrator could not sue an execution on the judgment, as it was clear that the administrator *de bonis non* was entitled to the money, and if

collected by his predecessor, he would recover it of him. And therefore to avoid circuity of action, the defendant was discharged from liability to the plaintiff in the judgment, and held chargeable to the new administrator for the value of the goods converted.

In *Gayle, Adm'r, v. Elliott*, 10 Ala. Rep. 264, it was decided, that it was not a good plea by an administrator in an action against him that he had resigned the trust, the plea should also alledge, either that he had administered the assets that came to his hands, or that he had delivered them to his successor: *Further*, that the 15th section of the act of 1821, "is explicit, and declares that an administrator shall not discharge himself by resigning his trust; it is made his duty to deliver to his successor all the assets and effects which shall not have been duly administered or applied. True, the authority and duties of an administrator cease with the resignation of his trust, and settlement of his accounts, but his conservative powers in respect to the estate still continue, until he absolves himself from responsibility by delivering it to his successor. He has not only the power, under such circumstances, to preserve the estate, but the law makes it his duty; otherwise, he would not be able to do, what not only the statute, but the common law, enjoins on him."

By the act of 1806, it is enacted, that if it appear, upon examination, that any administrator hath embezzled, wasted or misapplied, all or any part of the decedent's estate, or shall refuse or neglect to give bond, with security, when required by the orphan's court, that court may forthwith revoke or repeal the letters of administration, and thereupon commit the administration to such other person having a right thereto as will give the proper bond; who may have actions of trover, detinue, account and on the case, for such goods or chattels as came to the possession of the former administrator, and were withheld, wasted, embezzled, detained or misapplied, by him, and no satisfaction made for the same. [Clay's Dig. 221, § 4.]

The 19th section of the act of 1821, "to repeal in part and amend an act, entitled 'an act to regulate the proceedings in the courts of law and equity in this State,'" enacts, that "where any personal representative or guardian shall be dis-

placed, all moneys due to him or her in such right, by execution or otherwise, shall be paid to his or her successor." [Clay's Dig. 227, § 30.] The 15th section of the same statute provides that an executor, administrator or guardian, may by writing subscribed and delivered into the clerk's office, resign his or her authority: but in such case, he and his sureties shall be bound for all the assets or effects, which shall not have been duly administered or applied, or shall not be delivered to his successors. [Id. 222, § 9.]

The plea in the case at bar alleges, that the note declared on was given by the maker, and received by the plaintiff in consideration of personal property sold by the latter in his character of administrator, under an order of the orphans' court: Further, that afterwards, and before the commencement of this action, the plaintiff's letters of administration and his authority as administrator was revoked and annulled, and still are revoked and annulled; that the plaintiff is not administrator, nor entitled in any other right to maintain the action. We cannot doubt the sufficiency of this plea as a bar to the action, and if the plaintiff had sued in his individual, without noticing his representative character, it would have been equally available. The fact that a note or bond is made payable to an administrator *eo nomine*, it has been held in several of the cases cited, does not invest him with a title against his successor in the administration—if it was assets of the estate he represented, upon his resigning or being displaced, it would pass as such, to the administrator *de bonis non*.

We have seen that the act of 1806 authorises the orphans' court, if an administrator has embezzled, wasted, or misapplied all or any part of the intestate's estate, or refuses or neglects to give bond as required by law, to revoke or repeal his letters of administration. The administrator derives his authority from the orphans' court, and if that is withdrawn or annulled, what powers does he retain as such? Can he collect money due the estate? If he can, it must be because it is his duty to preserve the estate, and deliver it to his successor. I will not say that the right to receive money, or even maintain an action for it before the successor is appointed, is not *under any circumstances* a conservative power.

But where letters of administration have been *revoked or repealed* under the statute, the administrator retains no authority as such—his duty is, to deliver to the successor the assets unadministered. The object of annulling the grant is to take from the administrator the right to collect money due the estate, or to interfere further in the administration. The orphans court proceeds in such case upon the ground, that the administrator has been faithless to the trust, or has not given the security which the law requires, in order to indemnify all persons interested in the estate. If the revocation of his authority proceeded from the faithlessness of the administrator, or from its abuse, to permit him afterwards to maintain an action for money due the estate,, would only enable him to embezzle, waste or misapply the estate still further ; or if it was the result of neglect or refusal to execute a bond, the conversion of the assets into money would increase the risk of loss from the want of the proper security. In either case, the concession of such a power to a displaced administrator would most obviously thwart the policy of the statute, if not its very terms. Besides, the act of 1821 expressly declares, that in such case all monies due to the administrator, by execution or otherwise, shall be paid to his successor. This is equivalent to a positive declaration that no one else is authorized to receive them.

While this view carries out the letter of the statutes, it also preserves their spirit, and cannot possibly work harm to any one. There is no danger of loss to the estate from the administration remaining in abeyance ; for the statute is explicit in directing the orphans' court *mero motu*, upon the letters being revoked or repealed, "to grant letters of administration to such other person or persons, having a right thereto, as will give bond," &c. Should it not be presumed, if material, that this duty has been performed ? In the absence of any thing of which the reverse may be predicated, must it not be intended that courts and public officers have done what the law requires ? If then, the appointment of an administrator *de bonis non* be a material inquiry, should not that fact have been negatived by a replication. The view we have taken does not make it necessary to answer these questions.

Whether, if the plaintiff had merely resigned his trust, it would have been necessary to show the appointment of a successor, in order to make out his defence, the facts of this case do not make it necessary to inquire. It remains but to add, that the judgment of the circuit court is reversed, and the cause remanded.

ORMOND, J.—Dissenting.

In this case I dissent from the opinion just pronounced. Notwithstanding the removal of the administrator from office, the law casts on him the necessity of preserving the effects of the estate remaining in his hands, and he can only discharge himself, by handing them over to his successor. If the assets are chattels, it would be his duty to institute proceedings to recover them, if taken from him by a wrongdoer, and his failure to do so, would subject him to a responsibility, as was held by this court, in *Gayle, Adm'r, v. Elliott*, 10 Ala. 264.]

I am unable to perceive any distinction in principle between that case and the present. If a removed, or resigned administrator, cannot commence, or maintain a suit, on notes taken by himself upon the sale of the property of the estate, where no successor has been appointed, the consequence will be, that much loss may be sustained by the estate, as the debtor may be about to remove, or the bar of the statute of limitations may be nearly complete, and could only be prevented by the commencement of a suit. This power is entirely conservative in its character, and cannot possibly lead to abuse. Whilst, on the other hand, to permit such an objection as this, to be raised by the debtor, that the removed administrator, in whom the legal title remains until his successor is appointed, cannot sue, without showing that any other person has the right to sue, will certainly be productive of the most mischievous results.

JOHNSON v. ELLIOTT.

1. When the decree settling the equities in a suit against a non-resident, directs that it shall be suspended until the statutory bond is given, *quere*, whether a final decree afterwards rendered, during the same term, upon the report of the master, upon a reference directed by the former decree is not within its reservation.
2. It is error to decree a sum certain to a widow in lieu of dower, to be raised by a sale of the entire estate out of which the dower interest arises. The decree should be for the payment annually of the sum ascertained to be the annual value of the dower interest.
3. When the grantee of the husband, after his death, receives the rents, although the widow, upon a bill filed by her to ascertain and settle her claim for dower, is entitled to a decree for her proportion of the rents so received, the decree for what is due should be a general money decree, and it is not a lien upon the estate conveyed by the husband so as to override other charges, or liens created by the grantee.

Writ of Error to the Court of Chancery for the first District.

THIS bill is filed by Mrs. Elliott, against Johnson, and its object is, to obtain her dower, as well as to set aside a relinquishment made by her, of her dower interest in certain premises described in the bill, which it was alleged she was induced to execute after her husband's death, without any consideration, by reason of certain false representations made to her by Johnson and by one Walker, who owned the premises, jointly with her husband, and who, after his death, administered on his estate. The estate was conveyed by her husband and Walker to the defendant, Johnson, and one Chapman, and Chapman conveyed his half to Johnson, by deed bearing date the — day of ——. The bill alleges, that Johnson has been in possession of the premises, and receipt of rents, since November, 1835. Johnson is proceeded against as a non-resident defendant, and the requisite publication having been made, the bill was taken as confessed, for his omission to answer.

At the hearing, on the bill and decree *pro confesso* the chancellor decreed the relinquishment should be set aside, and directed a reference, to take an account of the rehts—to ascertain and report what portion of the same the complainant is entitled to receive as her dower right—and also to report whether dower can be assigned without manifest injury to the parties in interest, and if it cannot, what portion of money ought to be paid the complainant in lieu of dower, and whether it would be more beneficial to sell the premises and pay her portion out of the proceeds of the sale, or to permit her to receive annually one third part of an undivided half of the annual rents during her lifetime.

The question of costs, and all others not disposed of, reserved until the coming in of the report. It was also directed, that this decree should be suspended, until the complainant gave bond, with surety, conditioned to abide such order touching the restitution of the estate, &c., as the court may make concerning the same, on the appearance and petition of the defendant to have the cause reheard.

No bond appears to have been given, but during the same term of the court at which the hearing was had, and after the decree recited, the master reported, that the reasonable rents of the premises, after deducting reasonable expenses for repairs, and insurance, from November, 1835, to November, 1846, amounted to \$8,802, of which the complainant was entitled to receive one-sixth part, or \$1,467. Also, that dower could not be assigned without manifest injury to all the parties in interest, and that the complainant should receive in lieu thereof, \$1,000, which would be more beneficial to her than the receipt of one-sixth of the annual rents.

It was thereupon ordered at the same term as the former decree, that the defendant should pay into court the sum of \$2,467, the amounts due the complainant for back rents, and for the value of her dower, as ascertained by the master, by the 1st day of January, 1847, and in default that the premises be sold, &c.

The defendant now assigns as error—

1. The rendition of the decree, without proof of the allegations of the bill.

2. That he was never made a party to the bill.
3. That no bond was given pursuant to the decree.
4. That Walker should have been made a party.
5. That the decree allows one-sixth of the rents, &c., as dower, when her husband was tenant with Walker.
6. That the decree is erroneous.

E. S. DARGAN, for complainant in error.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—1. As the decree settling the equities of the cause, provides for its own suspension until the bond is given which the statute requires, when the defendant is a non-resident, and as there is some doubt with us whether that confirming the master's report, and directing the sale, is not to be considered as within the reservation of the other, we shall put our present decision on other points of the record.

2. The decree is erroneous in directing a sale of the entire estate conveyed by the husband, for the purpose of producing the sum ascertained by the master as the value of the complainant's dower interest. It is evident, that under a forced sale, it might happen that the whole interest which the husband had, and out of which the right of dower arises, would be sold without producing more than the sum decreed as compensation to the widow, and thus the purchaser, instead of losing one-third of the estate during the life of the widow, would be deprived of the whole. This matter was considered fully in the recent case of *Beavers v. Smith*, 11 Ala. 20, and we there held, that when compensation is made in money, the decree should not be for a gross sum, by estimating the supposed present value of the widow's life estate, but for the payment annually of the sum ascertained to be the annual value of the dower interest, during the life of the dowress, secured by a lien upon the estate. It was erroneous, therefore, in our judgment, to decree a specific sum to the widow, to be produced by a sale of the premises from which the right of dower arose.

3. It also admits of question, whether the sum ascertained as due the complainant, for her proportion of the back

rents was properly chargeable as a lien on the estate. It seems to us, this is a matter for which the decree should have been a mere money decree, against the defendant, and the effect of which would be to charge him personally. We do not see well, how the decree in its present form could, in this particular, affect him injuriously, if he remains the owner of the premises, and therefore might not feel warranted in reversing on this ground only, yet, inasmuch as a lien or charge created pending the suit, would seem entitled to override the claim of the complainant, on account of the back rents, we think any future decree should be put on the proper ground.

Decree reversed and cause remanded for further proceedings.

CASE AND ESLAVA v. P. AND C. BYRNE.

1. Upon a suit by husband and wife, on a note given to them jointly, for a debt created with the defendants, by the dealing of the wife with the consent of the husband, the defendants may set off an account, not included in the note, created in the same course of dealing.

Error to the Circuit Court of Mobile.

ASSUMPSIT by the defendants in error, on a promissory note.

The plaintiffs count upon a promissory note made to them by the defendants, in the usual form. The pleas are thus entered: "Defendants plead non-assumpsit, payment, and set-off, in short by consent." Signed by defendants' attorneys; and an entry by plaintiffs' attorney, "I consent to the above pleas in short."

The plaintiffs then demurred to the plea of set-off, and the demurrer was sustained by the court, and upon the trial of

the other issues, a verdict and judgment was rendered for the plaintiffs. Upon the trial, as appears from a bill of exceptions, the defendants proved that Catharine Byrne, one of the plaintiffs, was the wife of the plaintiff Patrick Byrne. That she had been trading with the defendants, in shrubs, plants and flowers, with the consent of her husband, and that he recognized her acts. That the note in suit was given in the course of these transactions, and that in the course of these dealings, she became indebted to the defendants in the sum of \$227 30, which was not included in the note sued on. The defendants then offered to prove the account as a set-off to the plaintiffs' demand, but the court on the plaintiffs' motion rejected the evidence, and charged the jury, that the plaintiffs must recover the full amount of the note. To all which the defendants excepted, and which they now assign as error.

W. G. JONES, for the plaintiffs in error.

1. The plaintiffs in error were defendants below. They put in a general plea of set-off, which was taken in short by consent in writing of the plaintiffs' attorney. It was certainly error to sustain a *demurrer* to this plea, if any imaginable off-set was allowable in this case.

2. The declaration shows that the note sued on was made to *both* the plaintiffs, and the pleadings (which of course can alone be looked to on the demurrer) do not show that the plaintiffs were husband and wife. For aught that appears, they may have been partners in trade, and of course there might possibly be a good set-off against their claim.

3. The bill of exceptions shows that the plaintiffs were husband and wife; that the note was made payable to *both of them* jointly, and grew out of trading and sales by the wife, with the husband's assent. She was therefore her husband's agent. The property sold was his, and the consideration of the note moved from him. The account offered as an off-set was of precisely the same character, and ought to have been admitted. The decisions below were doubtless made on the authority of the case of *Morris v. Booth and wife*, 8 Ala. R. 907. But this case is essentially different from that; in this case, the note sued on was made to *both*

husband and wife; there it was to the wife alone. In this case, it was proved that the consideration for the note moved from the husband—it is like the case of *Ferguson v. Lathrop*, 15 Wend. 625, where in a suit by husband and wife for rent belonging to the wife, a debt due from the husband to the defendant was held a good off-set.

DARGAN, contra.

ORMOND, J.—We do not consider the waiver of the plaintiffs' counsel, to extend further, than that he did not object to the pleas not being formally written out, and did not preclude him from raising the question by a demurrer, whether the pleas so indicated by their name, were good pleas in bar of the action, if formally pleaded. The demurrer was doubtless interposed upon the supposition, that the declaration disclosed the fact, that the plaintiffs were man and wife, and that therefore the plea of off-set could not be interposed to an action brought in their joint name. As the declaration did not disclose this fact, the demurrer, as now admitted in argument, was improperly sustained, even upon the concession, that a set-off could not in any case be pleaded, to an action commenced by husband and wife.

As the evidence of a set-off could only be introduced under a plea of set-off, the court having by its judgment excluded the plea, rightfully excluded also the evidence. But as it was in proof, that the plaintiffs were man and wife, and the question will be again presented when the cause comes on for trial again in the circuit court, we think it proper to express an opinion upon the evidence.

We can see no reason why the set-off in this case should not be allowed. The debt in suit, and the one offered to be set off, are both due in the same right, as they arise out of the same course of dealing. The wife can be considered in these transactions, in no other light than as the agent of the husband, and he is therefore responsible for her acts, and entitled to the benefit of her contracts. It can make no difference, that the promise of the defendants is to the husband and wife jointly. It is in law a promise to the husband, and he being responsible for the debt created by his wife to the

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defendants, when acting by his consent, the debt sued on, and the one offered to be set off, are due in the same right, and may be set off, the one against the other.

Morris v. Booth and wife, 8 Ala. 907, was a suit by husband and wife on a promissory note, made to the wife after marriage. This was evidence that the consideration moved from her, or in the language of the books, that she was the meritorious cause of the action; and therefore, the husband might join her with him in the suit. The consequence of thus joining her in the suit was, that the cause of action would survive to her, and would not go to the personal representative, if the husband died pending the suit; and that therefore a set-off against the husband, which might defeat this right, would be improper. [Bedgood v. Way, 2 Black, 1236; Rose and wife v. Bowles and Read, 1 H. Black, 108; Buckley v. Collins, 1 Salk. 114; Philiskirk v. Pluckwell, 2 M. & S. 393; 1 Chitty P. 31.]

It is scarcely necessary to remark, that no judgment is expressed upon the sufficiency of the declaration, as in the present position of the case, no question arises upon it.

Judgment reversed and cause remanded.

THE BRANCH BANK AT MONTGOMERY v. HODGES

1. A bill in equity, by which a *feme covert* asserts her marital rights against her husband; or seeks to have settled to her separate use, property, which he has purchased with her separate funds, is not such a proceeding *in rem*, as to make the decree therein rendered, conclusive on all persons; but is binding only on the parties to it.

Writ of Error to the Circuit Court of Barbour.

A WRIT of *fieri facias* issued from the circuit court of Mont-

gomery, against the goods and chattels, &c. of John P. Booth and others, which was received by the sheriff of Barbour, on the 7th September, 1846, and levied by him on the following day, on a male slave named Bob, as the property of Booth. Thereupon the defendant in error made an affidavit, and executed a bond with surety, to try the right, pursuant to the statute. An issue was accordingly made up and submitted to a jury, who returned a verdict for the claimant, and thereon judgment was rendered.

On the trial, the plaintiff in execution excepted to the ruling of the court. It is shown by the bill of exceptions, that the plaintiff proved the levy of the *fi. fa.*, the value of the slave, and the declarations of the defendant in execution, while he was in his possession. Other evidence was adduced, that Booth had won Bob at a game called *Faro*, in the year 1838, while he was the husband of the claimant's *cestui que trust*, Martha R. W. Booth. Evidence was also offered by the claimant, showing that Booth, the husband, had purchased the slave with the notes of one Sawyer, together with his declaration at the time of the purchase; that he intended the slave for one of his "chaps." Claimant then adduced an antenuptial settlement, dated in the year 1833, securing to the *cestui que trust*, certain property therein mentioned, but not embracing the slave in question. In this deed it was stipulated that the real estate and slaves devised to Mrs. Booth, by her father, and all other property which she might thereafter inherit, should be held and remain their separate and distinct estate, not subject to any other disposition, save only by the consent of herself and trustee: it was also stipulated, that the property embraced by the deed should "be and remain in the possession of said Booth, after said marriage, for the benefit of the parties."

Claimant introduced a decree of the court of chancery holden in Barbour county, at the November term, 1845, founded on a decretal order *pro confesso*, in which cause Mrs. Booth, by the complainant as her next friend, was complainant, and her husband was defendant. By that decree, the marriage settlement referred to, was reformed, and the slave in ques-

tion was secured to Mrs. Booth, as having been purchased with her separate funds. To the admission of this decree the plaintiff objected, but the objection was overruled, and the evidence admitted.

Plaintiff then adduced evidence to prove that Booth, the husband, was indebted to him and others when the decree was rendered, and that he was insolvent at that time. The court charged the jury, that the decree was a sentence *in rem*, and conclusive not only upon the rights of the parties and privies in this court, unless attacked for fraud, but upon the whole world; and that the title vested by the decree was paramount to any other title; whereupon the plaintiff excepted.

P. T. SAYRE, for the plaintiff in error, insisted, that the decree proved nothing as against the plaintiff, who was a pre-existing creditor. As evidence it was entitled to no more influence than a deed of gift, or other conveyance, from Booth, the husband, for the benefit of his wife. It should have been shown by evidence *aliunde*, that Bob was purchased with the money of Mrs. Booth. The law is well settled, that a judgment or decree is evidence of the matters adjudicated between parties and privies only; in respect to other persons, they are only admissible to prove the fact, that they were rendered. [1 Stark. on Ev. 6 Am. ed. 217; 1 Greenl. Ev. 3d ed. 672, 687; 7 Port. Rep. 476; 9 Id. 412; 7 T. Rep. 2.]

The decree is not *in rem*. Such a decree can only be pronounced by a court exercising peculiar jurisdiction, which enables it to pass upon the nature and qualities of a particular subject matter, of a public nature and interest, independently of any private party; such as bankruptcy, marriage, bastardy, testamentary matters, decisions in courts of admiralty, and adjudications upon questions of settlement. [1 Stark. Ev. 240.] A decree *in rem* can only be rendered in a proceeding in which any and every one may make him or themselves a party or parties. [Norris' Peake, 123; 9 Cranch's Rep. 126.] To make a decree *in rem* binding, the parties affected must have personal notice, or the thing itself must

be operated upon by process, or so affected as to warrant the implication of a notice to the person.

J. BUFORD, for defendant in error. The decree was admissible to prove the fact of its rendition, and as a link in the claimant's title. [1 Greenl. Ev. 1st ed. §§ 538, 539.] The object of the bill was to reform the antenuptial settlement, and to obtain a title to Bob, who had been purchased with the funds of Mrs. Booth; this indicates, that as it respects the slave in question, the decree is *in rem*, and can only be attacked for fraud, either by pre-existing creditors, or others whose debts were subsequently created. [1 Greenl. Ev. § 550; 8 Johns. Rep. 173; 3 Camp's Rep. 126; 8 C. & P. Rep. 679; 14 Pick. Rep. 280; 12 Mass. Rep. 488; 4 Id. 147; 13 Id. 153; 5 Johns. Rep. 101; 3 Binn. R. 338; 4 T. Rep. 187; 4 S. & R. Rep. 557; 20 Johns. Rep. 229; 1 Conn. R. 1; 1 Stew. R. 500; 6 Porter's R. 219, 241; 10 Ala. R. 355, 796.]

COLLIER, C. J.—If it could avail the claimant any thing to show that a decree had been rendered, such as was adduced by him, the record was admissible to establish that fact. But the decree as against the plaintiff in execution, would prove nothing more. The fact that the slave was purchased with Mrs. Booth's money, or that her husband had, without authority, converted funds which were a part of her separate estate, and that the slave was settled on her as a substitute for the money, before the plaintiff's lien attached, should have been shown by extrinsic evidence.

It is certainly true, that a judgment or decree operates as evidence against strangers to the original suit, where the proceeding is, as it is technically called, *in rem*. This it is said happens where a court exercises a peculiar jurisdiction, which enables it to pronounce on the nature and qualities of a particular subject matter of a public nature and interest, independently of any private party. Within this class are comprehended cases relating to marriage and bastardy, where the ordinary has certified; to sentences relating to marriages and testamentary matters in the spiritual court; decisions of courts

of admiralty, judgments of condemnation in the exchequer, and adjudications upon questions of settlement. The general rule in such cases is, that such a judgment, sentence, or decree, if final in the court in which it is pronounced, is evidence against all the world, unless it can be impeached on the ground of fraud or collusion. This rule seems to be founded upon one or both of these considerations: *First*, because it is essential to the existence of such a jurisdiction, that its judgment should be binding in all courts. *Secondly*, because all who are interested in the result may become parties to the proceeding. [1 Stark. Ev. 227 to 243, 1st Am. ed.]

In the case of the *Mary*, 9 Cranch's Rep. 144, Chief Justice Marshall says, the decisions of a court of exclusive jurisdiction, are necessarily conclusive on all other courts, because the subject matter is not examinable in them. With respect to itself, no reason is perceived for yielding to them a further conclusiveness, than is allowed to the judgments and decrees of courts of common law and equity. They bind the subject matter as between parties and privies. The whole world it is said are parties in an admiralty cause, and therefore bound by the decision. Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual can be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where the proceedings are against the person, notice is served personally, or by publication; where they are *in rem* it is served upon the thing itself. A notice served on a thing, will give information to all who have any interest in it; every such person may therefore be considered a party. But those who have no interest which could be asserted are not presumed to have had notice, and can on no principle of reason or justice be regarded as parties. When a person thus situated is brought before a court, in which the fact is examinable, no sufficient reason is perceived for precluding him from re-examining it. That this is allowable where the judgment of a court of common law, or the decree of a court of equity is drawn in question, under such circumstances is said to be unquestionable; and the learned

Chief Justice could perceive no reason why a different rule should prevail in a court of admiralty where its decree is there questioned by those who had no interest in the thing, that could be asserted there, and as to whom notice could not be implied.

This view of the law is quite sufficient to show, that a bill in equity, in which a *feme covert* asserts her marital rights against her husband ; or seeks to have settled to her *separate use*, property which he has purchased with her *separate funds*, is not such a proceeding *in rem* as makes the decree rendered thereon conclusive against the whole world. It is not essential to the jurisdiction exercised in such a case, that the decree should be binding in all courts, and as against all persons ; nor would it be competent for all persons who might in future set up some claim to the property thus situated, or insist upon subjecting it to the payment of the husband's debts, to become parties to that proceeding ; and upon no principle can they be charged with notice of its pendency. The consequences which attach to a proceeding and decree *in rem*, technically so called, cannot be applied in the present case, any more than in any suit in which specific property is recovered, or adjudged to be settled or conveyed in some particular manner. The principle which would warrant its application, would make a decree foreclosing a mortgage, or a judgment in detinue for the plaintiff, binding upon the whole world as to the facts determined. No such influence has ever been claimed for these, or cases of a kindred character ; and we have no doubt that upon principle and authority they are only binding upon parties and privies.

The claimant was a creditor of the husband, previous to the decree in favor of Mrs. Booth. It then devolves upon her trustee to show, either that the husband never had a title to the slave in controversy, or that it had passed from him for a valuable consideration before the plaintiff acquired a lien by issuing execution. This cannot be done by the mere production of the decree. Even if it had been rendered upon an answer denying the allegations of the bill, it would not be evidence against the plaintiff who was a mere stranger ; much less can it conclude persons in that predicament,

where it is the result of a decretal order taking the bill *pro confesso*. If the defendant in execution had settled the slave by deed, on his wife, no one would pretend that such a deed, unassisted by extrinsic proof, would be evidence to affect a judgment creditor. Here the decree is entitled to no greater influence; for it is only the judgment of law upon facts alleged by the wife, and admitted by the husband. It is, as it respects the plaintiff, *res inter alios acta*—proves nothing but the fact of its rendition—the basis upon which it rests should have been shown by the claimant, by other and unexceptionable proof. The consequence is, that the law was incorrectly ruled by the circuit court. Its judgment is reversed and the cause remanded.

FORWARD, ET AL. V. ARMSTEAD.

1. A promise by a father to a son, that if he will remove from North Carolina and settle in Alabama, he will give him a particular plantation and slaves, cannot be enforced in equity by specific performance as a contract, it being a mere gratuity, although the son is by it induced to break up at a loss, and is put to trouble and expense in the removal.
2. Part performance of such a promise, by putting the son in possession of the plantation and slaves, and his making improvements on the lands, will not warrant a court of equity in decreeing a conveyance by the heirs or devisees of the father after his death, no conveyance or written agreement to convey, or promise to convey, being proved.

Writ of Error to the Court of Chancery for the thirteenth district.

THE case made by the bill is, that William Armstead, the father of the complainant, John K. Armstead, as an inducement for the latter to remove with his family to Alabama from the State of North Carolina, where he was then living,

promised and undertook, if he would do so, to give him certain lands known as the Turkey Creek plantation, as well as certain slaves. That confiding in his promise to do so, the complainant did remove, at great loss and expense. That William Armstead, in part performance of his promise, put him in possession of the lands and slaves as a gift. That believing the lands were his, he has made valuable improvements on them, by clearing and opening a plantation, and also on other lands purchased by the complainant for the purpose of erecting dwelling houses, &c. as appurtenant to said plantation. That these improvements on the lands so purchased are of little or no value, except in connexion with the plantation. That William Armstead died without making any deed for the premises, leaving the defendants his heirs at law, some of whom have commenced suit for the recovery of the Turkey Creek lands. The prayer is, that this suit may be enjoined, and the defendants decreed to convey the title of the lands constituting the Turkey Creek plantation.

The defendants deny the material allegations of the bill, and set up the statute of frauds as a defence. They also exhibit the will of William Armstead, which directs the sale of the Turkey Creek plantation to be made by his executors—Forward and Westward Armstead—and the proceeds to be equally divided between Forward W. W. Armstead and Edmund Waddle. The answer also asserts, that particular allegations of the bill, such as that William Armstead had more affection for the complainant than his other children, is untrue, and state the contrary, as the complainant in North Carolina had been convicted of a criminal offence. This was excepted to as scandalous, and on that account was stricken from the answers. Several of the defendants, having no interest in the proceeds of the lands, were examined as witnesses, without any order of the court to that effect, and their depositions were on that ground suppressed at the hearing.

The general scope of the evidence is, that Armstead, the father, told his son John K. that if he would move to Alabama he would give him the Turkey Creek plantation, and that after his removal he put him in possession of it. It was

also in evidence that John K. sold his place in North Carolina at a low price, upon breaking up his residence there.

The chancellor considered it immaterial whether the agreement was to be considered as one for a sale or gift, as it had been partly performed by putting the complainant in possession, decreed that the title should be vested in him, and the suit enjoined at the costs of the defendants.

This decree is assigned as error, as is also the striking out the matter of the answer excepted to as scandalous, and the suppression of the testimony of the defendants having no interest in the suit.

BLOUNT, for the plaintiffs in error.

LESLIE and B. F. PORTER, contra.

GOLDTHWAITE, J.—The opinion here will be confined to an examination of the principal point, as the decision on that will be decisive of the suit.

It will be seen that the promise by the father to give his son the Turkey Creek plantation and slaves, is stated in the bill as a *contract*, of which the consideration is asserted to be the breaking up in North Carolina, and the expense and trouble of removing to Alabama. The proof, if it can be said to sustain the allegations of the bill even as to the *form* of a contract, has not the slightest effect in proving the *substance* of one. It is entirely evident that there was no subject or thing to be contracted for. The son was not bargaining for the plantation and slaves, nor was the father contracting for the son's removal. In other words, the slaves and plantation were not to be paid as the consideration for the removal, nor was the removal the cause which induced the promise to make the gift. It would scarcely be contended, if the gift had been made, and the question between the complainant and defendants was now, as it would be in case of the father's intestacy, whether the plantation and slaves were an advancement to the complainant, that the selling out in North Carolina and removal to Alabama would change the gift into a purchase, and thus let him in to an equal division of the remaining estate; and yet the same principle obviously must prevail in the one, as in the other case. As a

contract, the facts here do not constitute any thing near so strong a case as in *Kirksey v. Jones*, 8 Ala. Rep. 131; where we held, a letter by one to the widow of his brother residing 60 miles distant, promising that if she would come and see him, he would let her have a place to raise her family, was a mere gratuitous promise, although in consequence of the letter, she broke up and removed. On the same principle, the specific performance of a gift of lands was refused in *Reed v. Van Arsdale*, 2 Leigh, 569; though one of the judges there was of the opinion that if the promisee had incurred necessary expense in the removal, that performance should have been enforced.

It seems to us, that the expense incurred in a removal under such inducements, does not furnish the test whether the engagement is to be considered a contract, instead of a gratuity, because expense, or at least trouble, which is equivalent to it, must always be incurred; but as we have before indicated, the test is, whether the thing is to be *paid* in consideration of the removal, instead of being *given* from motives of benevolence, kindness, or natural affection.

2. There being in our judgment no ground to consider the promise in the nature of a contract, we shall next consider, whether a promise to make a gift will be enforced, when the subject of the gift is land, and the party has made improvements on it, after being put in possession by the donor, but the gift is incomplete from the omission of the donor to execute a conveyance. We have no decisions bearing directly on this proposition, except, on the one hand, sustaining the general proposition that equity will not enforce even a covenant which does not rest on a valuable or meritorious consideration; [*Darlington v. McCook*, 1 Leigh, 36;] and on the other, that it will do so, when there is a contract, although that, in the first instance, may be invalid for the want of writing, but is afterwards partly performed. It is evident neither of these propositions are sufficiently broad to let in, or refuse relief, in this particular case; for, as we have shown, there is no contract, and it seems to be sufficiently proved the complainant was let into possession, and made some improvements, or at least amelioration of the land as donee. Another principle may seem to have more bearing. It is

generally recognized, where one in possession under color of title, makes improvements which are known to the true owner, and he conceals the facts that he asserts a paramount title, he will not afterwards be permitted to recover the land without making compensation for the improvements. [1 Story's Eq. § 388, and cases there cited.] This principle, we apprehend, can have no application to a mere donee, unless he has been induced to make the improvements under the promise of a conveyance, (whether even then it would apply is a matter as to which we express no opinion,) for until then, it cannot be said that a fraud is practised on him; and it was his own folly to improve lands which he knew in point of law to belong to another, and when the uncertainty with regard to the title, could be determined at once by asking for a conveyance.

We have preferred to consider the case in this mode, without reference to the nature or value of the improvements, either upon the identical lands, or upon those which the complainant afterwards purchased for a residence, as appurtenant to the plantation. In any point of view, we are of opinion the bill should be dismissed.

Decree reversed, and bill dismissed.

HOWELL v. REYNOLDS.

1. The rule that a witness cannot be contradicted by proof of previous counter declarations, either written or verbal, applies to testimony taken by deposition, and if such supposed contradictory declarations, exist at the time the deposition is taken, the witness must have the opportunity afforded him of explaining it if in his power.
2. If a partnership, upon its dissolution, convey all its effects to one of the firm, and after such dissolution and transfer, a debtor of the firm promise

pay the individual partner, he may maintain an action in his own name on the promise.

Writ of Error to the County Court of Dallas.

ASSUMPSIT by the plaintiff in error. The declaration contains the common counts, and an account stated.

Pleas—Non-assumpsit, and the statute of limitations.

The plaintiff proved, that in the fall of 1841, the account sued on was presented to the defendant, at which time he said he would take the account, and do what was right about it; and by another witness, that in 1842, he promised to pay it, if plaintiff would give him a small credit for corn. Upon the account there was a credit for corn, and the defendant did not offer to prove any amount, as payment or set off.

There was evidence on the part of the defendant, tending to prove, that the account was created, whilst the plaintiff, and one Bonneau were partners, selling goods under the style of Howell & Bonneau. That the partnership was dissolved about the 24th of April, 1838, which was the date of the last item in the account, and that after the dissolution, the defendant had settled the account with Bonneau. It was also proved, that at the time of the dissolution, it was agreed between Howell & Bonneau, that all the accounts of the firm should belong to Howell, and that he should take the books and accounts, and receive the money due the firm.

The fact of the time of the dissolution of the firm, was proved by the evidence of Bonneau, taken by interrogatories, and for the purpose of discrediting his testimony, the plaintiff offered in evidence a voluntary affidavit made by Bonneau, in which he stated, that the partnership between himself and Howell was dissolved on the first January, 1838. Cross interrogatories were propounded by plaintiff to Bonneau, but he was not inquired of as to this affidavit, or informed that his testimony would be impeached. It does not appear when the affidavit was made. There was evidence tending to show, that the partnership was dissolved about the

1st January, 1838. The court refused to permit the affidavit to go to the jury, to which the plaintiff excepted.

The plaintiff moved the court to charge, that if the account sued on was made with the firm of Howell & Bonneau, and on the dissolution of the firm, the books and accounts were transferred to Howell—that the account was made out in his name, and when presented to defendant he promised plaintiff to pay it, he was liable in this action. The court refused so to charge, but instructed the jury, that if the account was a partnership transaction, the plaintiff could not recover; to which the plaintiff excepted. These matters are assigned as error.

LODOR, for plaintiff in error, made the following points :

1. The refusal of the court below to allow Bonneau's affidavit, referred to in the bill of exceptions, to go to the jury. [1 Phil. Ev. 293; Ewer v. Ambrose, 10 Serg. & L., or 4 Barn. & C. 25; De Suilly v. Morgan, 2 Esp. 691.]

2. The refusal of the court below to charge the jury, that Reynolds' promise to pay the account individually to Howell, made him liable to Howell in this action, under the circumstances detailed in the bill of exceptions.

3. The refusal of the court below to allow the plaintiff to poll the jury under the circumstances detailed in the bill of exceptions. [3 Black. Com. 377; Fox v. Smith, 3 Cow. R. 23; Blackley v. Sheldon, 7 John. 32; Bunn v. Hoyt, 3 Ib. 253; Root v. Sherwood, 6 Ib. 68; see head Polling of Jury, 6 Am. Com. L. Cases, 334 to 337.]

4. The matter of the bill of exceptions.

ORMOND, J.—The rule of evidence relied on to justify the exclusion of the affidavit of Bonneau, to contradict his testimony, is the rule established by the judges in the Queen's case, and which has been frequently held to be the law, by this court—that a witness cannot be impeached by proof of counter declarations made by him, without first asking him whether he has made such declarations. The reason of the rule is, that it may be in his power to explain the apparent

contradiction, and the rule is the same, whether the declaration of the witness supposed to contradict his testimony, be written or verbal. [3 Stark. Ev. 1741.]

The question is usually made, where witnesses are examined orally, in open court, and in our opinion, it must also apply to testimony taken by deposition, as the deposition is a mere substitute for the witness; and we can perceive no reason, why a witness testifying in this mode, should not be entitled to the same protection, as if he had testified orally, in the presence of the court and jury. If then this paper existed, when the plaintiff was notified, that the deposition of the witness was to be taken, and was informed by the interrogatories, of the testimony the witness was expected to give, it was his duty to give him an opportunity of explaining it, if he could, and reconciling it with the evidence he then gave; if there was any real, or apparent contradiction between them. But if the affidavit was made subsequent to the time when the interrogatories were propounded, from the necessity of the case, the plaintiff should have been permitted to offer it in evidence, as a declaration of the witness, contradicting his testimony. How the fact was, as to the time when this voluntary affidavit was made, we are not informed by the record; we must therefore presume in favor of the judgment of the court, that it is correct, until the contrary was shown. It is the duty of the party alledging error, to show it affirmatively upon the record.

But in the charge to the jury the court erred. The jury might have believed from the testimony before them, that the partners, upon the dissolution of the partnership, transferred all the accounts and effects of the firm to Howell, and that afterwards the defendant promised him to pay the account. We cannot doubt that it is competent for a partnership, upon its dissolution, to convey to one of the firm all its effects, and nothing is more common or frequent in practice, as the burthen of paying the debts frequently devolves on one of the firm. This arrangement would not, it is true, convey the legal title, so as to authorize such partner to sue

in his own name, upon a debt created in the name of the firm. But if, after such a transfer, the debtor promises to pay the debt to such partner, he may maintain an action upon the promise in his own name.

The last question made, upon the right of the plaintiff to poll the jury, under the circumstances of this case, need not be decided, as there must be another trial.

Reversed and remanded.

CARTER AND OTT v. MUNDY.

1. A witness who stated, that he had made a contract with the claimant for the purchase of the premises in question, which he considered advantageous, and that the claimant was to put him in possession as soon as he could, is an incompetent witness, on the ground of interest for the claimant, in an action of forcible entry and detainer, to recover the possession, though the witness also swore, he would not lose or gain by the event of the suit.

Writ of Error to the Circuit Court of Butler.

THIS was a proceeding for a forcible entry and detainer, pursuant to the statute, instituted by the defendant in error against Carter alone; a verdict and judgment having been recovered by the complainant, a *certiorari* was obtained by the defendant, who executed a bond with Ott as surety; conditioned for the successful prosecution of the cause in the circuit court. The errors assigned in that court being adjudged insufficient, the judgment of the justice of the peace was affirmed, and rendered against the defendant and security for costs. From a bill of exceptions sealed at the instance of the defendant Carter, it appears that on the trial before the justice, the complainant offered one Shipp as a wit-

ness, who stated that he had made a contract with the complainant for the purchase of the premises in dispute, provided he could obtain possession; that the contract was an advantageous one to him, yet he would not lose or gain any thing by the event of the suit: *Further*, that under the contract, the plaintiff was to put him in possession as soon as he could. Witness intended to cultivate or lease the land during the year 1846, (the same in which the suit was tried,) if he could get possession. The defendant objected to the competency of the witness to give evidence for the complainant on the ground of his interest, but the court overruled the objection, and adjudged that the witness was competent.

N. COOK, for the plaintiff in error, insisted—1. That to entitle a party to proceed for a forcible entry and detainer, he must have had the actual possession. [Minor's Rep. 131.] 2. That Shipp had such an interest in the event of the suit as disqualified him from giving testimony. [1 Phil. Ev. C. & H's ed. 63-332; 3 Id. 820-1.]

T. H. WATTS, for the defendant in error, contended, that the witness had no direct and immediate interest in the event of the suit, but was only interested in the subject matter. [6 Ala. Rep. 647; 9 Id. 803.] Whether the complainant had the *actual possession* and was expelled from it, is a point not presented to this court for revision.

COLLIER, C. J.—There is nothing in the record to indicate, that it was not shown the complainant had the actual possession of the premises in question; the complainant explicitly alledges that such was the fact, and it cannot be intended that it was not proved at the trial.

It is well settled, that to disqualify a witness upon the ground of interest, it must be shown that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be evidence, either for or against him in some other suit. It must be a present, certain and vested interest, and not uncertain, remote or contingent. [Massey v. Rogan, 6 Ala. Rep. 647; Stewart v. Conner, 9 Id. 803.] It must be in the event of the cause itself,

or in the record as an instrument of evidence in support of his own claims, in a subsequent action. So it must be a legal interest, as distinguished from the prejudice or bias resulting from friendship or hatred, or any domestic or social relation, or any other motive by which men are generally influenced; for these go only to the credibility. [1 Greenl. Ev. 432.]

Where the immediate effect of a judgment for the plaintiff, is to confirm the witness in the enjoyment of an interest in possession, or to place him in the immediate possession of a right, he is not a competent witness for the plaintiff. Neither can a lessor be admitted as a witness, to prove a right of possession in his lessee to a portion of the land, claimed as part of the premises leased. [1 Greenl. Ev. 438; Doe v. Williams, Cowp. Rep. 621; Smith v. Chambers, 4 Esp. Rep. 164; Rex v. Williams, 9 B. & C. Rep. 549.]

It is laid down by two distinguished elementary writers on the law of evidence, that if a plaintiff agree with a witness that in case he recover the lands, he will grant him a lease of them for so many years, this excludes his evidence; for the witness would have a fixed and certain advantage by the event of a verdict. [Gilbert's Ev. 108; 1 Phil. Ev. C. & H's ed. 63.] The learned annotators upon Phillips are of opinion that this dictum rests upon a sound principle, although it may seem to be questioned in *Ten Eyck v. Bill*, 5 Wend. R. 55, a case with which it did not conflict. We have examined this latter citation, and are satisfied that it is in harmony with the law as stated by the text writers, and that they are well supported by principle. [See *Peyton v. Hallett*, 1 Caine's Rep. 364; *Hovill v. Stephenson*, 3 Mo. & Payne's Rep. 146; *Wood v. Braynard*, 9 Pick. Rep. 322.]

In *Marquand v. Webb and Webb*, 16 Johns. Rep. 89, *Mr. Justice Spencer* says: "My opinion proceeds upon the principle, that whenever a fact is to be proved by a witness, and such fact be favorable to the party calling him, and the witness will derive a certain advantage from establishing the fact in the way proposed, he cannot be heard, whether the benefit be great or small. [See also *Stewart v. Kip*, 3 Johns. Rep. 89; *Pickett v. Cloud*, 1 Bailey's Rep. 362; *Stebbins v. Sackett*, 5 Conn. Rep. 258; *Wood v. Braynard*, 9 Pick.

Rep. 322 ; McCall v. Smith, 2 McC. Rep. 375 ; Jackson v. Hill, 8 Cow. Rep. 290.]

In the case at bar we think the witness had such an interest in the event of the suit as rendered him incompetent to testify for the plaintiffs. He had made a contract which he declared was an advantageous one, for the purchase of the premises in question, provided he could obtain the possession. This is quite sufficient to show that he was interested in the plaintiff's recovery, and his affirmation that he would not gain or lose by the result, was intended as a mere statement, that if the plaintiff was unsuccessful, the contract would be inoperative, and the witness would not be required to pay any thing upon it. The case comes within the influence of the citations we have made—it is this, a witness will obtain the benefit of an advantageous contract, if plaintiff succeeds in recovering property for which the suit is brought—he will derive no benefit from the contract if the plaintiff fails. The witness's interest is sufficiently shown by the statement of his relation to the parties. It therefore follows, that the judgment of the circuit court is reversed, and the cause thence remanded, that a *procedendo* may be awarded to the justice of the peace trying the cause, or his successor in office, and the appropriate proceedings be there had.

DUNN, ET AL. V. DAVIS.

1. A bequest of slaves "to my daughter Mina, during her natural life, and at her death to her heirs, or children," is not an estate tail, and vests a life estate only in the daughter—her children taking vested remainders.
2. A demand is not necessary when the action is detinue, although the defendant, previous to the action, held possession under one having the life interest.

Writ of Error to the Circuit Court of Shelby.

DETINUE by Joseph B. Dunn and others, against Davis, to recover a certain slave.

At the trial, the plaintiffs made title to the slave in controversy, under the will of Archer Barton, which contains this clause: "I give to my daughter Mina, during her natural life, and at her death to her heirs, or children, my negro man, Abram."

They then proved this will was made in the year 1832, in Lowndes county, in this State—that Mina therein named was then the wife of Solomon W. Dunn—that both husband and wife died in the State of Arkansas, previous to the commencement of this suit—and that the plaintiffs are the children of the said Mina Dunn.

The defendant offered evidence tending to show the said slave, in 1840, was levied on by virtue of a *fi. fa.* in favor of S. Ciley, against Solomon W. Dunn, and then sold under the same, as well as that he was purchased and paid for by the defendant. No demand in terms was shown previous to the commencement of the suit.

On this evidence, the court charged the jury, the plaintiffs were not entitled to recover.

Plaintiffs excepted, and now assign this charge as error.

CHILTON, for the plaintiff in error.

1. That from the entire clause it was clear the testator intended his grandchildren, to take as purchasers, and that the remainder to them was vested, not contingent. [4 Kent's Com. 212; Goodright v. White, 2 Black. Rep. 1010; Woodley v. Findley, 9 Alabama Reports, 720; McGraw v. Davenport, 6 Porter's Rep. 319; Fellows v. Tann, 9 Ala. Rep. 999; Dingly v. Dingly, 5 Mass. 535; Dunlay v. Dunlap, 4 Dess. 305, 318; 4 Paige, 293; 7 Paige, 328; 7 Paige, 544; Davis v. Tant, 6 Dana, 52.]

T. D. CLARK and S. F. RICE, for the defendant in error, argued—

1. By the term heirs, the testator referred to those who take the estate by operation of law, and therefore they cannot be considered as purchasers. [Shelly's case, 1 Rep. 93; Price v. Price, 5 Ala. Rep. 578; Harkins v. Coalter, 2 Porter, 463.]

2. If however, the title is in the children of Mrs. Dunn, as purchasers, then, as the defendant's possession was lawful, a demand was necessary after the death. [Stewart v. Frazer, 5 Ala. Rep. 114.]

GOLDTHWAITE, J.—1. I feel some degree of hesitation in expressing my individual opinion in regard to the construction of this will, inasmuch as it differs entirely from that of a majority of the court. What did the testator mean by the terms heirs, or children, must be the common question to be answered by all, for it is that intention which must be carried into effect if it be consistent with law. I understand him to mean, not merely children which should be living at his death, but all who should be subsequently born to his daughter. I also understand him to mean a matter greatly beyond this, and that if when his daughter died, there should be grand-children, or even more remote descendants, these also were to be the recipients of his bounty, if their parent descended from his daughter had ceased to live. This to me seems clear, from the use of the term heirs, or children. It then comes to precisely this—a gift to his daughter during her natural life, and at her death to her issue. If the will contained these terms, an estate tail in the most simple form would be created. That the testator intended to create such an estate, seems to me clear, from the circumstance of his omitting to make any limitation over in the event of his daughter's leaving no issue living at the time of her death. It seems evident to me, the testator considered himself as parting, by the bequest, with the entire interest in the property thus given to his daughter, and this is confirmed by the circumstance that he afterwards constitutes residuary legatees, without in any manner adverting to any reversion which might be supposed to arise from the failure of the issue *in tail*. Would it be a proper construction of this will,

to invest the residuary legatees under the will, or the general distributees of the testator, supposing him intestate, as to the reversion in this slave, with the title, if Mrs. Dunn, instead of leaving children had left only grand-children, or their descendants when she died? I state the question because its answer seems to me decisive of the case presented. If it is answered, there is no reversion until the descendants of children fail, as well as children, then the conclusion seems to me irresistible, that the terms used by the testator were intended in no other sense than as heirs of her body, and the will may be read, "I give to my daughter Mina, during her natural life, and at her death to the heirs of her body."

I am aware there are a series of decisions in the English chancery, which hold that children shall not be construed to include grand-children, or other descendants, and that the term is never equivalent to *issue*, unless a clear intention to make it so, appears from other terms in the will, but to my apprehension, the rule itself rests on most questionable grounds, and never could have been adopted, if children there, as with us, stood as general heirs. The first case is Cook v. Brocking, 2 Vern. 107, where a legacy was vested in trust to secure Ann Crewe a maintenance out of the interest during her husband's life, with the absolute disposal of the principal if she survived him, but if he was the survivor, the money to go to her sister's children, as she should advise. Ann died before her husband, without giving any direction, leaving an only sister, who at Ann's death had one child, and several grand-children in existence. Lord Jeffries determined the fund should be divided between the only child and the grand-children, but his decision was reversed by the Lords Commissioners on a re-hearing. This was followed in Rives v. Brymer, 4 Vesey, 692, in a case where the bequest was by a father, which was directed to be equally divided between his children, who should be living at the death of his wife, and grand-children were excluded. To the same effect is Radcliffe v. Buckley, 10 Vesey, 195. It is true, these decisions seem to turn on the construction of the testator's intent, but it cannot be disguised that the intention of a will in England might be quite different, so far as children are concerned, from what the same words used here would indicate. Of

course I shall not be misunderstood as extending this remark beyond the distinction existing in letting in all children with us, as general heirs ; and in this sense I apprehend the word children, with us, is most frequently used as heirs. Whatever might be the proper construction of such terms, when unexplained, the introduction in this will of the term heirs seems to me clearly indicative that the testator considered them as equivalent and convertible terms.

Having arrived at the conclusion that this will is to receive the same construction as if the words, heirs of her body were found where heirs, or children occur, it seems to me that no particular class of heirs is designated, and therefore that they are words of limitation, and not of purchase. If Mrs. Dunn was the devisee of real estate, in the same terms, an estate tail would be created within the rule of Shelly's case, and in accordance with all the cases, personal estate bequeathed by similar terms, vests absolutely in the first taker. [2 Roper on Leg. 351, 357, and cases there cited. See also, Robinson v. Fitzherbert, 3 Bro. Ch. 127.]

This is the course of reasoning which has led my mind to the conclusion, that the entire estate in the slave in controversy, under the will, vested in Mrs. Dunn, and consequently passed to her husband in virtue of his marital rights, but a majority of the court consider the will as investing her only with a life estate, and that the remainder was in the children of Mrs. Dunn, whether in *esse* at the death of the testator, or born subsequently. They consider it settled, that the term children, is in general, a word of purchase, and is to be construed as a term of limitation, only when it is absolutely necessary so to construe it, to carry into effect the testator's intention. [Buffer v. Bradford, 2 Atk. 221.] They also hold, this case as within the reason of the decision of Crawford v. Trotter, 4 Madd. 361, where a bequest to a female "and her heirs, (say children,)" was held to give her only a life estate with remainder to her children. In addition to the English cases, the majority of the court are sustained in their view by Knight v. Wall, 2 Dev. & Batt. 125, where a will in very similar terms to those used in this, was considered as vesting an estate in slaves in all the children of the person having the life estate, whether born before or after the death of the

testator. The result is, that the title of the plaintiffs is sufficient to warrant a recovery of the slave, and it was error to instruct the jury otherwise upon the evidence.

2. As to the question that no demand was made for the slave previous to the action, we all consider this immaterial, when the suit is in detinue. [Knight v. Wall, 2 Dev. & Bat. 125.] In that action, nothing but the title is in controversy, except in some peculiar cases, where the party, notwithstanding his title, is not entitled to the immediate possession. Judgment reversed, and cause remanded.

COLLIER, C. J.—The intention of the testator is the pole star in the construction of wills, and whenever consistent with law, it will be supported. It is perfectly clear to my mind, that the term "*heirs*," in the clause in question, is not to be received in the sense in which it is generally understood; as applied to *real estate*, or where used without restriction. The word "*children*," which is connected with it by the disjunctive "*or*," shows that it was intended as *designatio personarum*. This conclusion seems to me to be an obvious sequence, when the purpose of the testator, and the fact that the subject of the gift is personal property, are considered. We must take the words "*heirs or children*" in reference to the connection in which they are found, and to what must have been the testator's intention. Subjecting them to this test, I cannot doubt that "*heirs*" was used as a word of purchase, and consequently that the mother did not take an absolute estate, so as to let in the creditors of her husband to the exclusion of her children. I consider this point so well settled upon authority, that I will not amplify this opinion. [See *Vaux v. Henderson*, 1 Jac. & W. Rep. 388, n; *Lovelady v. Hopkins*, Amb. Rep. 273; *Bowers v. Porter*, 4 Pick. Rep. 198; *Richardson v. Wheatland*, 7 Metc. R. 173, 174; 2 Jarm. on Wills, 73, and notes; *Carter v. Bentall*, 2 Beav. Rep. 551; *Swift v. Swift*, 8 Sim. Rep. 168; *Newland v. Curshman*, 2 Moore & S. Rep. 105; *Ridgeway v. Munke-thick*, D. & W. Rep. 84; *Dalzell v. Welch*, 2 Sim. Rep. 320; *Gale v. Bennett*, Amb. Rep. 681; *Wyth v. Blackman*,

2 Ves. Sen. Rep. 191; *Merrymans v. Merrymans*, 5 Munf. Rep. 440.] Many other citations quite as pertinent might be added, but these, with those furnished by my brother GOLDTHWAITE, I think very satisfactorily sustain the judgment of the circuit court.

FARLEY v. GILMER, ET AL.

1. A bequest to the wife of real and personal property, "during her natural life, and at her decease to be left to my son, A. S. P.," vests immediately in the son, as an executory devise.

Error to the Orphans' Court of Montgomery.

THE plaintiff in error, as administrator of Algernon S. Pinkston, having represented the estate insolvent, and citation having issued to the creditors of the estate, they appeared and contested the fact of the insolvency of said estate, and insisted that the inventory submitted by the administrator was incorrect, and an issue being made up and submitted to the court, the following facts appeared:

That the plaintiff in error was administrator both of the estates of Algernon S. Pinkston, and of James Pinkston, his father. That James Pinkston made his last will and testament in 1834, as follows:

1. I give and bequeath to my grandson, James B. Pinkston, a slave named Peter.
2. I give and bequeath to my grand-daughter, Susanna Farley, at the age of eighteen, a slave named Catharine, and her increase.
3. I give, &c. to my grand-daughter, Eustatia Farley, a slave named Levin.

4. To my daughter Thurmutis Farley, the N. E. quarter of section 29, township 16, range 19; a slave named Tom; also a note of J. C. Farley, now in the State Bank, for \$750, due the first of January, 1832; also \$1500, as soon as it can be realized out of my estate, after paying my just debts.

5. I give, &c. to my wife, Gilly Pinkston, the balance of my property, both real and personal, consisting of lands and negroes, horses, mules, hogs, cattle, farming utensils, household and kitchen furniture, tan-yard and stock, during her natural life, and at her decease, to be left to my son, Algernon S. Pinkston.

6. It is my wish, that the land I now own, near Foreman's mill, be sold to pay my just debts.

After the appointment of executors, is this clause: "I have settled with my son, Lucien Pinkston, and Jona C. Farley, on his marriage with my daughter Eustatia. The will was attested by but two witnesses.

It was in proof, that a considerable amount of real and personal property went into possession of the widow after the payment of the debts. That Algernon was a minor at the death of his father, and died before his mother, leaving a widow, but no children. After the death of the widow of James Pinkston, the plaintiff in error, as his administrator, claimed the property she had received under the will of her husband, as belonging to his estate, and the question before the court was, whether it was a part of the estate of James Pinkston, or of his son Algernon, and the court decided that the personal property did pass under the will of James Pinkston to his son, and vest in him, and that on the death of the tenant for life, it passed to his personal representative. To which the plaintiff excepted, and which is the matter now assigned as error.

BELSER, for plaintiff in error, contended, that the bequest was clearly contingent, and that it was the duty of the court to give effect to it. He cited *McLeod v. McDonnell*, 6 Ala. 238; *McLemore v. McLemore*, 8 Id. 689; *Richardson v. Wheatland*, 7 Met. 171; *Inglis v. Snugharbor*, 3 Peters, 117; *Olney v. Hall*, 21 Pick. 311; *McRae v. Alston*, 2 Dess. 368; *Gregg v. Bethea*, 6 Porter, 10; *Marr v. McCullough*, 6

Id. 689; Dingley v. Dingley, 5 Mass. 537; Danney v. Allen, 1 Pick. 147; White v. Woodly, 9 Id. 138; Emerson v. Cutler, 14 Id. 115; Moore v. Smith, 9 Watts, 408; Bulsford v. Kibbel, 3 Vesey, 362; Billingsley v. Miles, 3 Atk. 219; Luke v. Robinson, 3 Merivale, 363; Cripps v. Wolcott, 4 Madd. 11; Pope v. Whitcombe, 3 Russell, 124; Marsh v. Wheeler, 2 Edwards, 156; Harris v. Fly, 7 Paige, 421; Cave v. Cave, 2 Vernon, 508; Hanson v. Graham, 6 Vesey, 239; Paterson v. Ellis, 11 Wend. 259.

ELMORE, contra.

ORMOND, J.—The question to be determined, upon the fifth clause of the will, is, whether the interest vested in the son immediately, at the death of his father, to be enjoyed after the death of his mother, or, whether his right to the property depended upon the contingency of his surviving his mother.

We think it does not admit of reasonable doubt, that it was intended the estate should vest immediately in the son, as an executory devise. This is a question of intention, to be gathered from the language employed in the particular bequest, subject to be controlled by other parts of the will, showing a contrary intention. There is nothing in the language employed in this case, indicative of an intention to postpone the vesting of this legacy, until the death of the tenant for life. "At her decease, to be left to my son," &c. is equivalent to saying, at her decease, I give the estate to my son, or remainder to my son, which would clearly give a vested interest in the remainder.

The general rule is in favor of the vesting of legacies, and this rule will prevail, unless a clear intention is shown on the will, that it shall not vest until the happening of the contingency; and in the language of Lord Eldon, in *Gaskell v. Harman*, 11 Vesey, 498, the court will not conjecture in favor of an intention, against the general rule.

This question generally arises in money bequests, payable at a future period, and the legacy will vest immediately, or be contingent, according as the intention is ascertained to be, to make an immediate gift, and to postpone the enjoyment

for a particular period, or until the happening of some future event, and, where there is no gift, distinct from the time of payment. [Fonnerean v. Fonnerean, 3 Atk. 645; Jackson v. Jackson, 1 Vesey, sr. 217; and see the cases collected on this head in Roper on Legacies, 375.]

But these rules, applicable to money legacies, have no application when the same words are applied to a devise of freehold estate. A devise of freehold estate to A, *when* he shall attain twenty-one years, will vest immediately in A, whether the devise be immediate, or only in remainder—[Doe v. Moore, 14 East, 601; Mackin v. Reynolds, 3 Brod. & Bing. 121]—although the same language, applied to a money legacy, would not create a vested interest, until the contingency happened. The intention of the testator here, was to convey his lands to his son, and although that has failed from the want of the necessary number of witnesses, it is nevertheless clearly indicative of his intention.

This intention, so far from being controlled by the residue of the will, is strongly confirmed by it. We find him leaving specific legacies to the rest of his children, for whom he had not previously provided, and no doubt can be entertained, that he did not intend to die intestate, as to any portion of his property, although from the defective execution of the will, it became inoperative to convey the lands. [McLemore v. McLemore, 8 Ala. 687; McLeod v. McDaniel and wife, 6 Id. 236.]

The decree of the orphans' court must be affirmed.

JONES, ADM'R. v. SWIFT.

1. An agreement between the distributees of an estate, to divide the property, and hold it subject to the debts of the deceased, gives to each of the distributees a *lien* upon the share of the other, for the payment of the debts.

contemplated; but will not subject the property so divided, in the hands of one of the distributees, to sale under a judgment obtained upon a note executed jointly by all the distributees, to a creditor of the estate for a debt due by the deceased. Whether the creditors of the deceased might not have availed themselves of this agreement in equity, or whether the distributees might not have been sued as executors *de son tort—quere*.

2. An execution cannot be issued against the estate of a deceased debtor, unless one has previously issued on the same judgment in his life time, and the fact that there is a plurality of defendants in the judgment, will not change the rule in respect to one who is dead.

Writ of Error to the Circuit Court of Dallas.

THIS was an action of detinue, to recover a female slave, named Rachel. The cause was tried by a jury, who returned a verdict in favor of the defendant, and judgment was rendered accordingly. From a bill of exceptions sealed at the plaintiff's instance, it appears that the slave in question was once the property of Ambrose Gibson, deceased; after his death, it was agreed between the plaintiff's intestate and William and Ira Taylor, who were the only distributees of the estate of Ambrose, that the estate should be divided between them, and they would hold the same subject to the debts of the deceased, as well those for which the distributees had made their joint notes as for other demands. The slave in question was allotted to the intestate, who took her into possession. Afterwards, judgments were rendered by a justice of the peace on notes given by the distributees jointly for a debt of Ambrose, the deceased; but no executions issued until after the death of the plaintiff's intestate. Executions were then issued, and levied on the slave Rachel by the direction of W. Taylor, and while she was in his possession, a public sale of her made, at which the defendant became the purchaser. There was no administration on the estate of Mrs. Gibson, until after the defendant's purchase—all the property of Wm. Taylor having been previously disposed of in the payment of the debts of A. Gibson and himself.

The plaintiff's counsel prayed the court to charge the jury, that if the distributees agreed among themselves, or with the

plaintiff in the executions under which Rachel was sold, that the property as divided should be liable to the old debts of A. Gibson, deceased—there being no lien on the estate at the death of the plaintiff's intestate, then the levy and sale which had been shown by the evidence, passed no title to the defendant, in the slave in question. *Further*, if the plaintiff in execution had any claim on the slave in question, if there was no lien at the time of Mrs. Gibson's death, it could only be enforced in a court of equity. These charges were severally denied, and the jury instructed, that if the facts to which the witnesses testified were true, the plaintiff could not recover. To the refusal to charge, and the charge given, the plaintiff excepted.

J. A. LONOR, for the plaintiff in error, insisted, that each of the charges asked should have been given, and that the charge given was erroneous. He cited Clay's Dig. 209, § 42; 12 Mass. Rep. 309; 9 Wend. Rep. 302; 2 Brev. Rep. 307; 4 Stew. & P. Rep. 237; 3 Ala. Rep. 254; 4 Id. 667; 7 Id. 660; 9 Id. 908.]

W. M. LAPSLEY, for the defendant in error, insisted, that the agreement between the distributees authorized the sale of the slave in question, though Mrs. Gibson died previous to the execution being issued. There could be no necessity for forcing the judgment creditor, or W. Taylor, to go into equity.

COLLIER, C. J.—The judgment under which the slave in question was sold, is not against the plaintiff's intestate and her co-distributees as the legal representatives or executors in their own wrong, of the estate of Ambrose Gibson, deceased. True, the debt for which it was rendered was due by the latter, and may have been a charge upon his executors or administrators, to be satisfied from the estate. But the distributees gave their individual note as a substitute for the original demand, and on the note thus substituted, the recovery was had. The case then, in a court of law, stands in the same predicament as if the judgment had been rendered on a note to the consideration of which A. Gibson, de-

ceased, was a stranger, and with which his estate had no connection.

In respect to the agreement between the distributees, to divide that estate, to pay an equal proportion of its debts, and to hold the property thus distributed subject to their payment, we cannot think it can legalize the execution against the intestate's estate. That was an agreement to which the plaintiff in execution was no party, and of which he could only have availed himself in a court of equity. Notwithstanding the agreement between the distributees, they might perhaps have been charged by a creditor of the deceased, upon the ground of their possession, as executors in their own wrong. But we have seen that the plaintiff in the judgment before us, did not thus proceed, but sued upon a personal liability of the distributees, the evidence of which originated after the death of A. Gibson.

It is perfectly well settled, that an execution cannot be issued against the estate of a deceased debtor, where one had not previously issued in his lifetime, on the same judgment, that no lien attaches in virtue of such an execution upon the personal estate of the deceased debtor in the hands of his administrator, and that the levy made under its mandate, will not prevail against the claim of the administrator. See cases cited by the plaintiff in error, and 4 Ala. Rep. 735. The fact that there is a plurality of defendants in the judgment, will not render a different rule applicable in respect to one who is dead. The death might be suggested, and execution issue against the survivors. [9 Ala. R. 335.]

The bill of exceptions states, that W. A. Taylor had purchased of A. Gibson all his property, and given to the latter his notes in payment—after the death of the vendor, the vendee proposed to his co-distributees to surrender the property thus purchased by him, and allow it to be divided as the property of the estate of the deceased, if they would agree that it “should be still held liable and subject to the debts of the deceased,” and also to the debts of the estate assumed by the individual notes of the distributees, notwithstanding the distribution. This proposition was assented to, and the property given up. This decision was effectual to invest the several distributees with the shares respectively allotted to

them, as between themselves and all other persons not having demands against the estate. The distributees, as we have seen, might perhaps have been chargeable as executors *de son tort*, upon the ground, that by the delivery of the notes of W. A. Taylor to him, and his renunciation of his purchase, the property, at the election of a creditor, might be treated as assets of the estate. But upon this point, as it is unnecessary, we express no opinion.

The agreement certainly gave to each one of the distributees a lien upon the share of the other for the payment of the debts contemplated. But it was not competent for either of them, without some legal warrant to take the part distributed to the other, and dispose of it for that purpose; and if he did not possess such authority, it is difficult to perceive upon what principle he could impart it to a sheriff, or other officer. The *fiery facias* under which the sale was made was, as we have seen, a mere nullity, as it respects the plaintiff's intestate, and was consequently ineffectual to pass her interest.

Mrs. Gibson's title to the portion of the estate allotted her, was independent of the control of W. A. Taylor, except for the purpose provided by the agreement. This did not authorize him, or an officer under void process, to take possession of, and sell it, although the proceeds were appropriated in payment of debts with which it was chargeable. It was competent for the creditor to have subjected the property by a judgment and execution against Mrs. Gibson's personal representative—so W. A. Taylor, upon payment of the debt, might have prosecuted his remedy at law against him—and perhaps both of them had a remedy in equity. The fact that the property was sold by A. Gibson, and after his death, it was given up and distributed among those entitled to his estate, cannot, we think, vary the case. We need add nothing more, what has been said will sufficiently indicate that the circuit court incorrectly ruled the law. Its judgment is consequently reversed, and the cause remanded.

PIERSON v. THE STATE.

1. When the bill of exceptions in a criminal case does not state evidence before the jury to warrant the particular instructions asked and refused, the legal presumption from the omission is, that there was no such evidence.
2. The common law of this State on the subject of *homicide*, is the same as the common law of England, and whenever that law requires the person assailed to decline the contest or to retreat, before he will be excused in taking the life of his adversary, our law requires the same.
3. The circumstance that the prisoner, after the killing, wipes the knife with which the fatal wound is inflicted, is not so controlling, or so insignificant, as to warrant the prisoner in calling for the charge that it is not evidence of murder, or to justify the court in instructing the jury that it was. It is a fact evincing coolness and self-possession, and as such, proper to be left to the jury in connexion with the other circumstances of the case, for them to determine whether the killing was with malice aforethought, or on sudden heat and passion.
4. It is not error for the court to refuse to instruct the jury, that they in capital cases are judges of the law as well as of the fact.

Writ of Error to the Circuit Court of Dallas, allowed in vacation by one of the Judges of the Supreme Court.

THE prisoner was indicted for the murder of one Rich, and tried and convicted at the spring term, 1846.

At the term when the indictment was found, that is, at the fall term, 1847, and before the grand jury had returned any bills of indictment, and in the absence of any evidence whatever, that the grand jury had acted on any criminal matter, the prisoner, by his counsel, stated that he was confined in jail, on a charge for the murder of one Rich, and that his case would likely be before the grand jury. He thereupon moved the court to have the grand jury brought into court and purged in reference to his guilt or innocence; and that each grand juror might be asked before they were sworn and organized, and at the time they were so sworn and organized, whether he had any fixed opinion as to the guilt or in-

nocence of the prisoner, which would bias his finding. The court overruled the motion, and the prisoner excepted.

At the trial, it was proved that in the course of the day the deceased and the son-in-law of the prisoner had a rencounter, not long after which, the prisoner approached the deceased, and urging his fist against the neck of the deceased, said he could break the neck of a damned Scotchman. The deceased was then drunk, but made no resistance. This occurred in a grog-shop, the keeper of which interposed, and prevented any further difficulty. Deceased shortly afterwards invited the prisoner to drink with him, and they drank together. The prisoner then lay down on a bench in the shop for two or three hours, apparently asleep. In the mean time, the deceased was sitting on the steps of another grog-shop, under intoxication, muttering something with occasional oaths. The prisoner was first observed peeping round the corner of the house, and approaching, said, "damn you some too." The deceased rose staggering, and said, "uncle Reub, you must not talk so"—and went towards the prisoner, who drew his knife. Some one interfering, the prisoner said, "let him come on, and I will kill him"—or some such expressions. The deceased had nothing in his hands. A person interposed and said to the prisoner, it was a shame to draw a knife on a drunken man. The matter was suspended for a few minutes, and the other persons present started away. Without knowing exactly who approached the other, the prisoner and the deceased were shortly seen in contact, the prisoner having the accused by the collar, when the latter struck the prisoner twice with his open hand, in or about the face; when the prisoner made an ineffectual blow with his knife. On the deceased repeating the slap, (so called by the witness), the accused made another blow with his knife, which struck the deceased about the breast, and caused almost instant death. The proof showed the deceased to have been an inoffensive man, drunk or sober. The knife was an ordinary pocket knife, the larger blade sharp-pointed. The whole transaction, the last meeting and rencounter lasted a very short time—say four or five minutes. Rich was thirty or thirty-five years of age—the prisoner an old man—they had always before been very friendly, and had

drank together two or three times after the meeting in the morning, and before the prisoner lay down on the bench.

After the evidence was concluded, and a general charge by the court upon the common law rule upon the subject of self-defence, and as to what that required to be shown to entitle or avail the prisoner to that defence, the prisoner, by his counsel, asked the court to charge the jury—

1. That the prisoner, after he had been slapped three times in the face by Rich, was not bound to retreat before he killed him.

2. That no man in this country is bound, according to the English common law, to retreat before he kills.

3. That the prisoner's wiping his knife, after he had killed Rich, is not evidence that he committed murder.

These were all refused by the court.

4. That the jury are judges of the law, as well as the facts.

This was refused in the language asked for, but the court charged the jury they had the right to render a general verdict, and thereby adjudge the law and the facts, and the judge was thus precluded from granting a new trial on the belief the jury had mistaken either, that their verdict was final as to both law and fact.

The prisoner excepted to the several refusals to charge as requested, and to the charge as given; and now assigns the several rulings of the court as error.

LODOR, for the prisoner, made the following points:

1. The refusal of the court below to charge the jury, that the prisoner, after he had been slapped three times by Rich, was not bound to retreat before he killed him.

2. The refusal of the court below to charge the jury, that no man, in this country, is bound, according to the English common law, *to retreat* before he kills another. [The State v. Caywood, et al., 2 Stew. 360.]

3. The refusal of the court below to charge the jury, that the prisoner's wiping his knife after he had killed Rich, was not evidence that he had committed murder.

4. The refusal of the court below to charge the jury, that the jury are judges of the law as well as the facts, in the lan-

guage asked for. [The State v. Jones, 5 Ala. 666; 4 Black. Com. 361; People v. Crosswell, 3 Johns. Cases, 287; Commonwealth v. Knapp, 10 Pick. Rep. 477; The State v. Snow, et al. 18 Maine R. 346.]

5. The charge as given by the court below, "that the jury had a right to render a general verdict, and thereby adjudge both the law and the facts, and the judge was thus precluded from granting a new trial, on the belief that the jury may have mistaken either, that their verdict was final as to both law and fact." [State v. Slack, 6 Ala. 676; U. S. v. Fries, 3 Dal. R. 515; Commonwealth v. Green, 17 Mass. 515; The People v. McKay, 18 John. 212.]

6. The matters of the first and second bills of exceptions. [The State v. Hughes, 1 Ala. 655; People v. Jewett, 3 Wendell, 314; Commonwealth v. Smith, 9 Mass. 107.]

ATTORNEY GENERAL, contra.

GOLDTHWAITE, J.—1. The three first of the charges which the circuit judge refused to give at the instance of the prisoner, do not seem to have been called for by any evidence before the jury. It will be seen by reference to the bill of exceptions, there was no proof of any assault by the prisoner, which *justified* or *excused* him (in the legal sense of these terms) in taking life in self defence, and we must presume the proper instructions were given as to the effect which the conduct of the deceased might have had upon the question of malice and heat of blood. So too, it will be seen, there is nothing from which this court can ascertain that the prisoner, in point of fact, did or did not wipe his knife deliberately, or otherwise, after the fatal blow. It may be, that all these charges were refused on the ground, that no proof was before the jury to warrant their being asked. And such in our judgment is the legal presumption arising out of the omission to state the circumstances of proof, from which the right to instructions might appear.

2. Lest, however, it should be supposed our opinion was, that under peculiar circumstances it might be the prisoner's right to require such charges, we shall briefly state the law as we understand it. The common law of this State on the

subject of homicide, is derived from, and the same as, the common law of England, and whenever that law requires the person assailed to decline the combat, or to retreat, before he will be excused in taking the life of his adversary, our law requires the same. There is nothing in our institutions which has abrogated the rule, that no one is excused from shedding his brother's blood, unless the assault upon him is such as to produce a well-grounded apprehension of imminent danger to life or limb.

3. The refusal to charge, that the wiping by the prisoner of his knife, after the killing, was not evidence that he committed murder, is not, as we have before said, called for by the proof, but if it was, we think was not so controlling, or so insignificant a circumstance as to warrant the prisoner in calling for the charge, that it was not evidence of murder, or to justify the court in instructing the jury it was. Doubtless it was a fact evincing coolness, and self possession, and as such properly left to the jury, in connection with the other circumstances for them to determine, whether the killing was done with malice aforethought, or upon sudden passion, induced by the assault, and slapping in the face, or other heat of blood, lessening the crime to manslaughter.

4. Upon the question, whether, according to the course of the common law, juries in this State are judges of the law as well as the fact, we consider it as substantially settled by what is said by us in *The State v. Jones*, 5 Ala. 666. There the point was, whether the jury was properly sworn, to give a true verdict according to the evidence—the prisoner insisting the oath should be, to find a verdict according to *law* and evidence. We there considered the court as the proper tribunal to expound the law to the jury, and that the latter had no other control over questions of law than that arising out of the right to return a general verdict of not guilty. We consider what is there said as a proper exposition of the law. The slightest examination will convince every one, that if the jury, and not the court, are the proper expounders of the law, there could properly be no revision of a verdict on this ground, either by the judge trying the cause, by awarding a new trial, or by an appellate court upon the ground of misdi-

rection. If the jury are the judges of what is, and what is not law, why call on us as a court of errors, to revise the action of the circuit court upon a point of law. We cannot better state our opinion upon this question, than by quoting the opinion of one of our soundest jurists. "The jury, says Judge Story, are no more judges of the law in a capital, or otherwise criminal offence, upon the plea of not guilty, than they are in every civil case tried on the general issue. In each of these cases their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each case they must necessarily determine the law, as well as the fact. In each case they have the physical power to disregard the law as laid down by the court. But I deny that in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it, but in case of error there would be no remedy or redress by the injured party, for the court would have no right to review the law as it had been settled by the jury." [U. States v. Battiste, 2 Sumner, 240.]

We are too apt, in speculating on a subject like this, to consider, that courts will always be prone to settle the law rigidly against crime, or that juries must always lean towards a lax construction of criminal law, without reflecting that prejudice and passion may sometimes operate with fearful violence in the jury box against the particular individual. Our law has wisely provided therefore for the protection of all just rights, that the courts shall expound it, whilst on the other hand, by confiding to juries the power of returning a general verdict, it is rendered almost impossible the citizen can ever be injured by the tyranny or oppression of the judge. Beyond this, even in providing for a revision of the cause, upon exceptions tendered, and by writ of error, the legislature has placed its citizens in security from the mistakes which

possibly may occur in the rulings of the judge at the trial. We are satisfied the law was correctly expounded by the circuit judge.

With respect to the motion of the prisoner to examine individual grand jurors, as to their opinions of his guilt, or innocence, before swearing them on the panel, the decision in *Clarissa v. The State*, 11 Ala. R. 57, is conclusive that it was properly refused.

Having now examined all the points raised in this court against the proceeding in the court below, we have only to add our judgment, that there is no error in the record.

Affirmed.

THOMPSON v. SPINKS.

1. Rent in arrear, or falling due, is merely a debt due from the tenant to the landlord, for the payment of which he has, under the statute, a *lien* on the crop grown on the premises, and when it is removed, either by the tenant or a stranger, he cannot maintain trespass for its recovery.
2. Where a tenant delivered certain cotton to one D, with instructions to take it to Mobile and sell it, and pay the landlord the rent of the land, but of which arrangement the landlord was ignorant; after which, the defendant, as sheriff, levied upon and sold it, as the property of the tenant: Held, that though D being as bailee of the cotton, invested with the right of possession, might have maintained trespass for an injury to it, the landlord having neither the possession, or the right to it, could not.

TRESPASS by the defendant, against the plaintiff in error, sheriff of Sumter.

The defendant pleaded not guilty, and justified under an execution against one Cooksey.

Upon the trial, it appeared that Cooksey rented certain land of the plaintiff, in the year 1844, on which he raised the

cotton specified in the plaintiff's declaration, and that Cooksey was indebted to him for the rent. That Cooksey gathered the cotton, and carried it off the rented premises, to the gin of one Carr, for the purpose of being ginned. That when the cotton was carried there, and before the levy, Cooksey delivered the possession of the cotton to one Davis, with instructions to take it to Mobile and sell it, and pay plaintiff the rent of the land, which he agreed to do. This arrangement was made without the knowledge of the plaintiff, and it did not appear that he knew of it until after the levy. After this, and whilst the cotton was unpacked, the sheriff levied on and sold it under execution against Cooksey.

The defendant asked the court to charge, that if the cotton had been removed by Cooksey from the rented premises, before it was levied upon, the plaintiff had no such property therein, as would entitle him to maintain this action; which charge the court refused, and charged, that if the cotton was raised by Cooksey, on land rented from the plaintiff, which rent was due and unpaid, when the levy was made, the defendant was not authorized to levy thereon, unless the rent was first tendered or paid, and if he did so, was liable in this action.

Also, that if Davis were the agent of Cooksey, and not of plaintiff, and Cooksey merely placed the cotton in possession of Davis, to be taken to Mobile and sold, and the proceeds thereof to be applied to the payment of the debt due the plaintiff for rent, it did not give the plaintiff any such property in the cotton, as would enable him to maintain this action; which charge was also refused. The defendant excepted to the charge given, and the refusals to charge, and now assigns these matters as error.

BALDWIN, for plaintiff in error, contended—

1. That the ruling of the court below could not be sustained by the statute, (Clay's Dig. 210, § 45); nor on the 3d section of the statute of rents, (Dig. 506); nor on the 4th section, for they only inhibit the *removal* of the goods, &c. from premises before payment of rent, and direct sheriff to pay, out of proceeds of sale, the rent.

2. At common law, it is obvious trespass would not lie on

the facts. Plaintiff had neither title nor possession. Nor does the charge rest on, but is independent of, the fact of any notice or knowledge of rent due, on the part of the sheriff—defendant; and of any demand.

It is too trite to insist that trespass is framed to redress injuries to the possession; and unless this be shown, the action cannot be sustained. [1 Chit. Pl. 175; 4 Taunt. 547.]

A bargainee cannot maintain this action, although the statute transfers the possession to the use. [Comyn's Dig. tit. tresp. b. 3.]

Even if the plaintiff had title to the cotton, he had not possession; and title without possession will not do. [Toby v. Reed, 9 Conn. 217.]

S. W. INGE, contra.

1. The landlord of rented premises has a precedent claim upon the produce of such premises for the rent money. [Clay's Dig. 306, § 4; Ib. 506, § 3.]

2. The possession of Davis, as agent, was the possession of Spinks, the principal. [Frazier, use, &c. v. Thomas, 6 Ala. 169; Desha, Sheppard & Co. v. Pope & Son, 6 Ala. 690.]

ORMOND, J.—The act of 1807, forbids the taking in execution, goods, or chattels, found upon any rented premises, and provides that they shall not be removed therefrom, unless the party suing out the execution, pay, or tender to the landlord, one year's rent, and the sheriff is required to levy, and pay to the plaintiff, as well the money so paid for the rent, as the execution money. [Clay's Dig. 210, § 45.] In 1812, the common law right of distress for rent, was abolished.

In 1821, an act was passed subjecting the crop grown on any rented land, to the payment of the rent, and requiring one year's rent to be paid before an execution could be levied upon the crop. [Id. 506, § 3.] In 1843, an act was passed declaring that "the crop grown on any rented land, shall not be removed off the premises of any such rented land, by the tenant, or lessee, or any one else, until the tenant, or lessee, shall have first paid to the landlord, or lessor, his agent, or at-

torney, all the rent in arrear." The second section of the act, gives the landlord process of attachment, when the tenant has removed, or is about to remove the crop, or any part thereof from the rented premises. [Ib. § 5.]

The first of these statutes is borrowed from, and is almost a literal copy of the 4 Anne, c. 14, and the last was probably suggested by the 11 Geo. 2, c. 19, which gives the landlord the right to distrain on goods fraudulently removed from the rented premises; but neither of these statutes gave the landlord any property in the goods of the tenant, either general or special, but merely created a lien in his favor.

The policy of this State, as declared by the statutes cited, is, to abolish the common law right of distress, and to confine the *lien* of the landlord to the product of the rented land. The prohibition against the removal by the tenant, or any one else, of the crop from any rented land, until all the rent in arrear is paid, gives him a *lien* upon it for the payment of all the rent due, except as against an execution creditor, as against whom he can have only one year's rent. But this is a *lien* merely, and not a right of property in the crop. The means of enforcing this *lien*, is provided by the act of 1843, by attachment against the tenant for the rent. [Hawkins v. Gill, 6 Ala. 620.] We need not inquire in this case, whether this *lien* would be lost by a removal, and sale of the crop, to one ignorant of the existence of the *lien*, as no such fact exists in this case. It is manifest the effect of our statute is, that rent in arrears, or falling due, is merely a debt due from the tenant to the landlord, for the payment of which, the latter has a *lien* on the crop grown on the premises, and it results necessarily, that he cannot maintain trespass, for the recovery of the crop when removed, either by the tenant or a stranger. To maintain the action of trespass, for injury to a personal chattel, the plaintiff must establish, either actual possession, or a right to the possession, from having the general property, which would draw to it the right of possession; trespass being founded on possession, as trover is on property in the thing. [Ward v. Macaulay, 4 Term, 490; Cooper v. Chitty, 1 Burr. 20; Croft v. Allison, 4 B. & Ald. 590; Smith v. Milles, 1 Term, 475.]

It is quite obvious, the *lien* of the plaintiff is not a general

property in the crop, nor did the plaintiff have in fact the possession, he cannot therefore maintain trespass. His remedy, if he did not resort to the statute remedy by attachment, was an action on the case.

The placing the cotton in the possession of Davis, gave *him* such a special property in it, as might have enabled him, possibly, to maintain trespass for an injury to it, but could not invest the plaintiff with such a right. Davis was the bailee of the *tenant*, and his authority being derived from, might be revoked by him. It conferred no right in the cotton to the plaintiff, which he did not have before, in virtue of his *lien*.

It results from what has been said, that the court erred in its refusal to charge as requested, and the judgment must be reversed, and the cause remanded.

CLAUNCH v. ALLEN.

1. The covenants for quiet enjoyment, and never to claim or assert title to the premises, are real covenants, running with the land, and if broken after the land has been conveyed to an assignee, the latter alone has the right to sue for damages; unless by the nature and terms of the assignment, the assignor is bound to indemnify the assignee, when it seems, he may sue in his own name.
2. The words "grant, bargain, sell," are all necessary in a deed, to create the statute covenant, that the grantor was seized of an indefeasible estate in fee simple, &c. and for quiet enjoyment.

Writ of Error to the Circuit Court of St. Clair.

THIS was an action of covenant at the suit of the defendant in error, on a deed by which the defendant below conveyed to the latter certain lands. The breaches alledged in the declaration are, that the defendant entered upon the lands conveyed, and ejected the plaintiff therefrom against his will;

further, that the defendant had no title, either equitable or legal, to a part of the lands (specially designated), nor has he acquired any since the execution of the deed; *also*, that defendant, at the date of the deed, had not good right, full power, and lawful authority to bargain and sell the part of the land thus particularized. There is a fourth breach, the same as the first, with the addition that it alledges the defendant, after ejecting the plaintiff, has kept him out of possession, and taken the use, rents and profits of the lands to himself; by reason whereof the plaintiff has lost, and been entirely deprived of the lands, and the money paid therefor. The defendant demurred to each of the breaches, and his demurrer was overruled to the fourth, and sustained by the consent of the plaintiff to the preceding. Thereupon the cause was submitted to a jury, who returned a verdict for the plaintiff, and judgment was rendered thereon.

From a bill of exceptions sealed at the defendant's instance, it appears that the deed from the defendant to the plaintiff contains no express covenants of warranty, seizin, &c.; that it is dated on the 11th February, 1840. It was proved on the part of the plaintiff that he took possession of the premises thus conveyed; that in 1841, he removed therefrom and rented the same to one Love, as his tenant for the year 1842, who continued to occupy the same until about the 1st February, 1843, when he removed, leaving the premises unoccupied until about the 20th of that month, when the defendant put one Crane into possession, who continued to occupy for three years. On the same day that Crane was put into possession, the plaintiff and defendant both came on the premises—the plaintiff protested against Crane's keeping the possession, and thereupon the defendant and Crane agreed to give up the possession on the next day; but on the next day the defendant told Crane to continue to hold it; and the latter then refused to yield it to the plaintiff. Crane neither paid nor agreed to pay to the defendant any rent; one year they sowed some oats in partnership, which they divided—plaintiff proved the annual value of the premises, and here rested his case.

The defendant then gave in evidence the exemplification of a judgment rendered at the term of the county court of

Tuscaloosa, holden on the first Monday in February, in favor of the President, &c. of the Bank of the State of Alabama, against the plaintiff below, as the drawer and acceptor of a bill of exchange, and others as its indorsers. On the 20th April, 1840, a writ of *fieri facias* issued on this judgment, which was placed in the hands of the sheriff of St. Clair on the 2d July thereafter, and by him returned unsatisfied for want of bidders. An alias *fi. fa.* was issued on the 10th August, 1840. The defendant next offered a deed bearing date the 15th October, 1841, executed by the sheriff of St. Clair, by his deputy, which recites the levy on, and sale by him of the lands in question, on the first Monday in January, 1841, under a *fieri facias* issued on a judgment of the county court of Tuscaloosa, corresponding in amount, dates and parties with that above described. It is recited in the deed that the plaintiff in execution became the purchaser for the sum of \$435 80; and thereupon the conveyance is made to the President and Directors of the Bank, &c. This deed was acknowledged by the deputy sheriff, and recorded by the clerk of the county court of St. Clair on the 29th November, 1841.

The defendant also adduced the *fieri facias* described in the deed by the sheriff, and proved that the subscribing witness thereto was authorized to receive the deed for the grantees. It was further shown, that one Morris, who assumed to act as the agent of the bank, rented the lands in question to one G. W. Allen in 1842 for the sum of \$40, and took his note for that sum, payable to the President, Directors, &c. G. W. A. took and retained possession under this contract for a few weeks, and was then forcibly ejected by the plaintiff in this action.

The evidence being closed, the court excluded the exemplification of the judgment from the county court of Tuscaloosa, the *fieri facias* and sheriff's deed consequent thereupon. The defendant then prayed the court to charge the jury, that, if the evidence be true (which is all above recited), then the plaintiff is not entitled to recover: Further, that in this action the plaintiff could not recover, if he was not in the actual possession of the premises, or any part thereof at

the time the defendant put Crane in possession. These several charges were refused; and the defendant excepted, as well to the rejection of the record, as to the refusal to charge as prayed.

J. T. MORGAN, for the plaintiff in error. The record was improperly excluded—when connected with the *fieri facias* and sheriff's deed, it shows that the title to the lands, and all interest which the plaintiff acquired by his purchase from the defendant was divested. [2 Greenl. Ev. —; 6 Ala. Rep. 390.] His title being gone, the plaintiff could not maintain an action for the breach of covenant. After the sale under the *fi. fa.*, the plaintiff had nothing but a *bare possession*, and when he abandoned that, the defendant or any one else might enter and occupy against him.

L. E. PARSONS, for the defendant in error.

COLLIER, C. J.—The deed which the plaintiff has set out in his declaration contains none of the usual express covenants; and the only breach alledged in the declaration, upon which an issue was tried, is that which affirms that the defendant entered upon the lands conveyed, and ejected the plaintiff therefrom against his will; and after ejecting, has kept him out of possession and taken the use, rents and profits to himself. This breach evidently presupposes a covenant for *quiet enjoyment*, to prove a breach of which it is ordinarily necessary to give evidence of an entry upon the grantee, or of expulsion from, or some actual disturbance in the possession; and this, too, by reason of some adverse right existing at the time of making the covenant, and not of one subsequently acquired. But it is said, it will not suffice to prove a demand of possession, by one having title; nor a recovery in ejectment; or in trespass; unless there has also been an actual ouster. If, however, the grantor himself enters tortiously, claiming title, it is a breach. [2 Sugd. Vend. 512, 10th ed.; Sedgwick v. Hollenback, 7 Johns. Rep. 376.] But not if the entry was without claim of title. [Seddon v. Senote, 13 East Rep. 72; Penn v. Glover, Cro. Eliz. 421.] The declaration does not alledge that the entry of the de-

fendant and ouster of the plaintiff was under a claim of title, and it may well be questioned from the authorities cited, if he entered as a mere trespasser without any pretence of right, the plaintiff could maintain the present form of action; but would have to resort to the action of trespass.

However this may be, if the plaintiff had sold and conveyed the interest which he acquired under the deed from the defendant, or it was levied on and sold under an execution against his estate, he cannot maintain an action for a breach subsequently occurring. A covenant *for quiet enjoyment*, as well as *never to claim or assert title to the premises*, are said to be *real covenants, running with the land*. When either of these covenants, or others coming within the same category, are broken after the land has been conveyed to the assignee, the general rule is, that he alone has the right to sue for the damages; but if by the nature and terms of the assignment, the assignor is bound to indemnify the assignee against the breach of such covenants, it seems that the assignor may sue in his own name. [2 Greenl. Ev. 195, § 240. See also Griffin v. Fairbrother, 1 Fairf. Rep. 81-91; Bickford v. Page, 2 Mass. Rep. 460; Kane v. Sanger, 14 Johns. Rep. 89; Niles v. Sawtel, 7 Mass. Rep. 444; Wyman v. Ballard, 12 Id. 306; Sprague v. Baker, 17 Id. 586; King v. Kerr, 5 Ham. Rep. 156; Clark v. Redman, 1 Blackf. Rep. 381; Mitchell v. Warner, 5 Conn. Rep. 497; Withy v. Mumford, 5 Cow. Rep. 137; De Chamont v. Forsythe, 2 Pennsylv. Rep. 507; Williams v. Beeman, 2 Dev. Rep. 483; Markland v. Crump, 1 Dev. & Bat. Rep. 94; Astor v. Miller, 2 Paige's Rep. 68; Suydam v. Jones, 10 Wend. Rep. 180.] And an assignee under a sheriff's sale, as well as under a mortgage, comes within the rule we have stated. [McCrady v. Brisbane, 1 Nott & McC. Rep. 104; Tufts v. Adams, 8 Pick. Rep. 547.] If these citations lay down the law correctly, the plaintiff cannot maintain an action for the supposed breach of covenant, although there were no other objection to its maintenance, than the assignment of his title by the sale and conveyance by the sheriff.

If the possession was left vacant by the plaintiff, or those holding under him, an entry upon it after the sale by the sheriff, would not be a trespass against the plaintiff; because,

as he had parted with the title, he could not be deemed to have the constructive possession, which, where there is no one in possession, or claiming adversely, will be referred to the title.

But if all these objections to the plaintiff's right to recover were out of the way, there is perhaps another alike fatal. We have said that the deed contains no such express covenant, and the question is, can a covenant be implied. The 20th section of the act of 1803, "respecting conveyances," [Clay's Dig. 156,] enacts, that in all deeds to be recorded in pursuance thereof, whereby an estate of inheritance in fee simple, shall hereafter be limited to the grantee or his heirs, the words "grant, bargain, and sell," shall be adjudged an express covenant to the grantee, his heirs and assigns, &c., to wit: that the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor (except the rents and services that may be reserved,) as also for quiet enjoyment against the grantor his heirs and assigns; unless limited in express words contained in such deed: and the grantee, his heirs, executors, administrators and assigns, may in any action assign breaches, as if such covenants were expressly inserted. [See *Roebuck v. Dupuy*; 2 Ala. Rep. 535; *Stewart v. Anderson and another*, 10 Ala. R. 504.]

In *Gee v. Pharr*, 5 Ala. R. 587, it was decided, that the words, "grant, bargain, sell," must all be used in a deed, so as to create a covenant against incumbrances, &c. within the act cited; that the omission of either of these words would prevent the deed from thus operating. There the operative terms were, "bargained, sold, released, aliened, and confirmed," and it was held that they did not make the statute covenant. The deed before us, uses the terms, "hath bargained and sold, and by these presents doth bargain and sell." If the case cited is to be recognized as authority, it is clear that the deed does not come within the act; that it contains no covenant to which the breach applies, and that the demurrer should have been sustained, not only to the three last, but to the fourth breach also- [See *Frost v. Ray-*

mond, 2 Caine's Rep. 188 ; Sweitzinger v. Weaver, 1 Rawle's Rep. 377.]

The error in the rulings of the circuit court is so apparent from what has been said, that it is needless to add more than to declare, that the judgment is reversed, and the cause remanded.

FALKNER v. JONES AND LEITH.

1. Under the statute which allows landlords to defend ejectment suits, it is not necessary the technical relation of landlord and tenant should exist. The act extends to all persons claiming title consistently with the possession of the occupier.
2. Any one having the title under which the tenant in possession holds, and who is entitled to an immediate right of entry against him, must be allowed to defend as his landlord, although the ejectment suit is by the purchaser of the tenant's title at a sheriff's sale.
3. The assignment of a land certificate, made by the original purchaser, under his hand and seal, operates under our statute as a conveyance of all the assignor's interest in the land, and the assignee has a superior title at law, to a purchaser at a sheriff's sale under a judgment rendered subsequent to the assignment.
4. Such an assignment is not within the registration acts, and does not become inoperative against the sheriff's vendee for the omission to register it.
5. An assignment of a certificate ~~not~~ under seal, does not pass the legal title, and is not proper evidence in an ejectment suit by a sheriff's vendee. The improper admission of merely cumulative evidence is sufficient to reverse a judgment.

Writ of Error to the Circuit Court of Cherokee.

TRESPASS to try titles to a certain tract of land, commenced by Falkner against Leith.

Jones was permitted by the court to defend as landlord of

Leith, to which the plaintiff objected—1. Because there was no proof of this relation. 2. Because the plaintiff was the purchaser of Leith's title at a sheriff's sale. Both grounds for the objection were admitted to exist, but notwithstanding Jones was admitted to defend.

At the trial, the plaintiff claimed as the purchaser at sheriff's sale, on the 6th March, 1843, under a judgment obtained in the circuit court of Cherokee, against Leith, on the 11th October, 1842. He proved that Leith entered the land previous to the judgment, and was in possession from 1833 until February, 1844, and had made valuable improvements. The suit was commenced 20th September, 1843.

The defendants exhibited and proved a title as follows :

1. The receipt of the receiver of the proper land office, for the land in question, issued to Leith the 4th October, 1842, on which was indorsed an assignment, under the hand and seal of Leith, of the same date, in these words: "For value received, I assign the within certificate to Moses Jones, and hereby authorize the patent to the within described land to issue in his name. Witness my hand and seal, &c. Transferred in due form by James Leith to Moses Jones, 4th October, 1842.

J. T. BRADFORD, Register."

2. An assignment also indorsed on the same certificate purporting to convey all Leith's right, title and claim to the particular tract of land. This is of the same date as the other, but is not under the seal of Leith, although signed by him, and being acknowledged before the same officer.

3. A copy of the last named transfer, under the certificate, of the commissioner of the general land office, and under the seal of that bureau, stating it as a copy of the original on file in that office. This was offered in evidence without any proof of its execution, or of the loss or absence of the original, and without any preliminary proof whatever.

4. A patent from the United States to Jones, as the assignee of Leith, bearing date 1 May, 1845. This was offered to show, that the inchoate, legal title had been perfected.

The plaintiff objected to the introduction of each part of this evidence, but the court allowed it.

One of the plaintiff's witnesses was asked by the defendants, if Jones had not paid off the judgment under which the land was sold. The plaintiff objected to this question, but the court allowed it to be answered, and the witness said the balance not produced by the sale of the land was paid by Jones, under a judgment obtained by the plaintiff under garnishee process, on the 10th of April, 1845. This was all the evidence.

The plaintiff asked the court to exclude from the jury each paper given in evidence by the defendants. This was refused.

The plaintiff asked the court to charge the jury—

1. That if they believed all the evidence, they should find for the plaintiff.

2. That Jones being permitted to defend as the landlord of Leith, can set up no defence in this action which Leith could not; and that Leith was estopped from denying the title of plaintiff in this suit.

3. That as it is not allowable for a defendant in execution to defeat the purchaser at the execution sale, by showing he held under another, so his landlord when let in to defend, can show no title or right inconsistent with the possession sought to be recovered in this case.

4. That if they believed the defendant, Leith, was in possession at the time of the rendition of the judgment, and so remained until after the sheriff's sale, then the plaintiff is entitled to recover, although the legal title to the land was in Jones at the time of the judgment.

5. That if the plaintiff purchased the land at sheriff's sale, without notice of Jones' claim of title, the assignment of the receiver's receipt was void as against the plaintiff, unless it was recorded in the office of the clerk of the county court of the proper county.

6. That the assignment of the receiver's receipt as first above stated, did not convey the legal interest to the land.

All these charges were refused, and the plaintiff excepted to all the several rulings of the court against him.

The assignment of errors opens all the questions raised on the record.

S. F. RICE, for the plaintiff in error.

PARSONS, contra.

GOLDTHWAITE, J.—1. The question at the outset of this case is, whether Jones was properly allowed to defend as landlord—it being admitted he did not stand in that technical relation to the other defendant—and the plaintiff claiming as a purchaser at sheriff's sale, of whatever interest Leith had in the premises. The plaintiff insists, the defendant under these circumstances is estopped from setting up any title whatever. We shall first consider whether the technical relation of landlord and tenant must exist to let one claiming the title into the defence. Our statute of 1836, [Dig. 321, § 49,] is very general in its terms, and seems to have been intended to introduce the practice of the English courts in this respect. The act of parliament of the 11 Geo. 2, ch. 29. uses the term landlord in the same sense as our own statute, and the decisions under it are, that it extends not only to landlords properly so called, but also to all persons claiming title to the premises, consistently with the possession of the occupier, though no acts of ownership have been previously exercised by them. The question in all cases is, whether the party applying to defend as landlord, be himself interested in the event of the suit, or whether he be merely set in motion for the purposes of some other person. [Steph. N. P. 1443.] It is evident from this, that the nature of the title which the plaintiff claims, must to some extent influence the action of the court in admitting a party to defend as landlord; for instance, if in this case there was an unexpired tenancy in Leith, at the time of the application, and the plaintiff was willing to concede the ultimate title in Jones, the latter would have no interest to defend the suit.

2. But assuming the legal title to the land was in Jones by the assignment of the certificate, or that he claimed it to be so, then it is apparent Leith stood to him, or was conceded by those parties to stand to him, in the relation of a tenant at will, whose estate was determinable at pleasure.

In this relation, if our statute was out of the way, it is scarcely possible any court would allow a plaintiff in an ejectment suit, to obtain possession under the pretence that there

was an estate in the tenant, especially if before the execution of a *habere facias*, the party actually determined the estate by an entry or eviction. It is a general rule, that the judgment in an ejectment suit, binds only those who are parties and privies to it, and the decisions are numerous where courts have interposed to set aside writs of possession where one was disturbed whose possession was distinct from that of the parties to the proceedings. [Howard v. Kennedy's Ex. 4 Ala. Rep. 592, and cases there cited.] It cannot be contended at this day, that a suit against the tenant operates so as to deprive the landlord of his right of entry, on the determination of the tenancy, and there certainly is no reason to allow a plaintiff in ejectment to recover a mere naked possession, which he cannot legally hold for an hour, especially against one whose title he is estopped from disputing. It is very possible, the object of the English act of parliament, as well as our own statute, was intended to prevent this precise mischief. It is true, the decisions in the New York courts assert the rule broadly, that a defendant in execution cannot set up any title as against the purchaser at the sheriff's sale, but in this State the rule must be received with considerable qualification. The leading case of Jackson v. Graham, 3 Caines, 188, is not to be distinguished in its facts from this, but it was probably decided before the statute was passed in that State, allowing landlords to defend, and in the opinion it is expressly conceded, the vendee of the defendant in execution, holding his conveyance anterior to the judgment, could enter upon and have his action against the purchaser at the sheriff's sale, the next hour after he came into possession, and that the latter would be estopped to deny his title. If this be a correct exposition of the law, there would be two useless suits—first of the purchaser at sheriff's sale against the debtor—then of the debtor's vendee; and only in the third ejectment suit would there be any investigation of the title as between the purchaser at the sheriff's sale and the previous vendee of the debtor. Certainly such circuitry of action should be avoided if possible. The rule may be true in the absence of the statute, that the defendant in execution cannot be allowed to defend against the sheriff's ven-

dee, as was held in *Avent v. Read*, 2 Porter, 480, but with the statute, we think any one having the title under which the tenant in possession holds the occupation, and who is entitled to an immediate right of entry against him, must be allowed to defend as landlord. The case of *Davis v. McKinney*, 5 Ala. Rep. 719, and *Thompson v. Ives*, at the present term, are in perfect harmony with the course of practice under the English statute, and sustain the conclusion now attained.

3. Having ascertained there was no error in allowing Jones to defend the suit, we shall inquire whether his title is preferable to that acquired by the plaintiff under the sheriff's sale. In doing this, we need not examine his title, as it is considered to be the settled law in this State, that the title acquired by the entry of lands, although incomplete, is yet a legal title, and as such subject to sale under a judgment at law, *Goodlet v. Smithson*, 5 Porter, 245; *Rosser v. Bradford*, 9 Ib. 354.] It will be seen that both the assignments of the certificate were executed some days before the lien of the judgment was operative, and therefore the only question on the merits is, whether these, or either of them, operated as a legal conveyance of the title. The only difference between the two is, that one has a seal, and the other has none, and the one with a seal transfers the certificate, whilst the other purports to convey the land. We have a statute, passed in 1812, which provides, "that all certificates issued in pursuance of any act of Congress, by any of the boards of commissioners, register of a land office, or any other person duly authorized to issue such certificate, upon any warrant of survey, or to any donation or pre-emption claimant for any lands in this State, shall be taken and received as vesting a full, complete and legal title in the person in whose favor the said certificate is granted to the lands therein mentioned, and his, or her, or their assigns, so far as to enable the holder of such certificate to maintain any action thereon, and the same shall be received in evidence in any court in this State.— [Dig. 341, § 157.] In *Bullock v. Wilson*, 2 Porter, 436, this statute was considered as covering a receiver's certificate of the entry of lands, but no question was raised as to the mode of assignment. In *Masters v. Eastes*, 3 Porter, 368, it was

held, the assignment of a certificate not under seal, was insufficient to protect the assignee against a suit by the assignor, to whom the patent subsequently issued, though it was conceded a deed conveying the land would be an effectual defence. In *Ansley v. Nolan*, 6 Porter, 379, we considered an unsealed transfer of the land, written on the certificate, as insufficient to convey the legal title so as to enable the transferee to sustain an action for the land. Conceding that these decisions establish that the assignee of the land, or of the certificate, must be one constituted by a sealed instrument, it is evident one of the transfers here is of that dignity, and the only question is, whether the assignment of the *certificate* is the transfer of the *land* named in it. Whatever might be the conclusion, if the statute just quoted was out of the way, we think the construction of that is, that the title to the land passes by an assignment under seal of the certificate. It will be seen it is the *holder* of the certificate who is invested with the capacity to maintain a suit, and although upon common law principles, the conveyance of the land might produce the same result, yet we think it impossible to avoid the conclusion, that the legislature intended by this enactment to make an assignment of the certificate equivalent to a conveyance of the lands. It is also to be observed in this connection, that the practice of the land office, from a very early date, has been, to recognize assignments even less technical than this court has held to be valid, and patents daily issue to assignees of the certificate, under the hand of the original purchaser. [See Land Laws, part 2, 307; Act of Con. 10 May, 1800, § 7; Act of 23 Jan. 1832, Land Laws, P. 1, 492.] We come to the conclusion therefore, that the transfer of the certificate, under the seal of the assignor, was a valid conveyance of the assignor's interest in the land.

4. The remaining question to be determined is, whether this assignment is inoperative for the omission to register it. It is in view of this question, that we have omitted to place this decision on the ground that the assignment, independent of the statute we have referred to, was operative as a conveyance. If regarded merely as a conveyance of the land according to common law principles, it might be difficult to say it was

not within the registration laws; but looking to the statute and the acts of Congress, which evidently point to the assignment of the *certificate*, it is impossible to imagine, it was intended these inchoate titles, or their assignments other than by the ordinary modes of conveyance should be registered. The point is certainly not without difficulty, but with the practice of the land office, known and acted on for a great length of time, to grant the patent to the assignee, we think the law is, that the assignment of the land office certificate, by a valid instrument, will prevent the title for the land from passing to a subsequent purchaser, under a sheriff's sale. We limit our opinion to the precise case before us, because it is impossible to examine these questions without being aware of the necessity for the utmost caution.

5. Without particularly examining all the other questions raised by the bill of exceptions, it is only important to say, that the other evidence of title was improperly admitted. We speak now with reference to the conveyance of the land which is without seal. This at least only showed an equitable title in the assignee, which did not enable him to defend this suit at law. Although this, and possibly too, all the other evidence for the defendant was entirely unnecessary, yet as it was improperly admitted, the judgment must be reversed. We understand the rule to be, that the admission of testimony irregularly, although it is merely cumulative, is sufficient to reverse a judgment.

Reversed and remanded.

CARROLL & BEALL v. THE MAYOR AND ALDERMEN OF TUSKALOOSA.

1. An authority conferred on the corporation, to collect taxes on " auctioneers, transient dealers, and pedlars," will justify it in imposing a tax either upon the amount of the sales of such persons, or in the form of a license to the auctioneer.
2. A party who complains that too high a tax has been assessed against him as an auctioneer, and removes the case by *certiorari* to the circuit court, is there entitled, if he demands it, to a trial upon the merits, and to show that too high a tax has been assessed ; though in cases of ordinary taxation, it seems redress must be sought from the mayor and aldermen, and that their decision is final.

Error to the Circuit Court of Tuskaloosa.

THE mayor of the city of Tuskaloosa, issued an execution against the plaintiffs in error, directed to the marshal of the city, commanding him to make the sum of \$104 22, the amount due by them on goods sold at auction, and commission, in that city, as given in by them or their agent, on oath, for the year next preceding the 1st March, 1845, to the city of Tuskaloosa. This execution was superseded on the petition of the plaintiffs in error, alledging that the tax assessed against them, was illegal, and a *certiorari* was awarded to the mayor.

Upon the trial of the cause, as appears from a bill of exceptions, the only record, sent up as a return to the *certiorari*, was a book purporting to be written, and made out by James Hogan, and others, during the month of April, 1845, as assessors of taxes for the city of Tuskaloosa, for the year ending April, 1845 ; in which was the following entry : " Carroll & Beall, auction sales \$2069 27, on commission \$7319 15, and the execution issued by the mayor and aldermen, upon which was endorsed a levy by the marshal ; whereupon the defendants moved the court to quash the execution, and render the *supersedeas* perpetual ; which motion the court re-

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fused ; but on motion of the plaintiff dismissed the *certiorari*, although the defendant urged a trial on the merits.

The charter, bye-laws, and ordinances of the corporation, were made a part of the case by the petition.

The assignments of error present for revision, all the matters presented on the bill of exceptions.

PECK and WHITFIELD, for the plaintiff in error.

PORTER, for defendant in error. 1. The remedy by appeal is specifically given to parties aggrieved by the statute chartering the city of Tuscaloosa. [Acts of 1835-6, sec. 9.] When a particular remedy is given by statute, that must be pursued. [Russell v. Peirce, 7 Porter, 276 ; Miller v. Goffe, 9 ib. 265.]

2. A writ of *certiorari* is not allowable in such a case as this. [Clay's Dig. 294, sec. 29 ; Bobo & Johnson v. Thompson, 3 Stew. & Port. 385 ; Whelock v. Wright, 4 ib. 163 ; John v. The State, 1 Ala. R. 95.]

3. As to the powers of the corporation, see the charter, pamphlet, p. 7, sec. 9, latter part ; p. 8, sec. 11, showing his remedy in case assessment is too high : ib. p. 10, sec. 4, 5 ; ib. p. 18, sec. 2, 3. The charter says expressly, that if any assessment is too high, the aggrieved party shall complain to the mayor and aldermen, *whose decision shall be final*. (See p. 8, sec. 11.)

ORMOND, J.—By the act incorporating the city of Tuscaloosa, power was given to the corporation to levy and collect a tax on real estate, not exceeding twenty-five cents on the one hundred dollars worth, where the lots are improved, and not exceeding one dollar on the hundred dollars worth, where the lots are unimproved ; fifty cents on the one hundred dollars worth of personal property kept within the city, and a poll tax not exceeding the State poll tax.

By an amendment of the charter, power was given to the city "to levy and collect taxes upon auctioneers, transient dealers, and pedlars."

The corporation has passed the following bye-laws, bearing upon this subject, and as the levy of a tax "on all goods, wares, and merchandize, not belonging to citizens of this

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corporation, sold at auction, one and a half per cent. on the amount of sales, which sum shall be reserved from the proceeds of the sales by the auctioneer, and by him paid to the city collector, and it shall be his duty to file with the city assessor, the affidavit of the persons at whose instance the sale was made, shewing whether the said sales were made for the benefit of citizens, or other persons.

On all goods, wares, and merchandize, sold in this city, on commission, for the benefit of persons not residing in this city, one per cent. on the amount of the sales." Other portions of the bye-laws will be hereafter noticed.

It is contended by the counsel for the plaintiffs in error, that the power to levy and collect a tax upon auctioneers, does not authorize the imposition of a tax upon the amount of their sales, but can only be exercised by a tax, or license, upon the privilege of selling by auction. The power conferred, is to levy and collect taxes, on "auctioneers, transient dealers, and pedlars," and in our judgment it is the same thing, whether the tax is imposed in the form of a license to the auctioneer, or upon the sales actually made by him. In either case it is a tax upon the sale, as the auctioneer must be refunded the amount paid for his license, and this must of necessity come out of the proceeds of his sales. It is the same in its operation, as an impost, or duty upon the importation of goods, which is as effectually a tax upon the consumer, as if it was levied by an excise on the goods in their hands.

The objection that this form of imposing the tax, may in its effect amount to a prohibition, and so interfere with the subjects of State taxation, is answered in the same way. Such might also be the effect of the imposition of the tax in the form of a license, which might be so high as to prevent all sales by auction within the limits of the city. Whatever weight the argument might be entitled to, if the power had not been granted to the city to levy a tax on auctioneers, it is entitled to none, the power having been expressly conferred on the corporation.

The remaining question, that the defendants should have been permitted to show, that the tax was improperly imposed, and that the goods sold on commission, did not belong to non-residents, but to resident citizens, and therefore ex-

Carroll & Beall v. The Mayor and Aldermen of the City of Tuscaloosa.

empt from taxation by the ordinance, involves the consideration of the question, of what is brought up by the writ of *certiorari*, and the mode of proceeding in the higher court.

There is an inherent difficulty in reviewing the judgments, if they may be so called, by which a tax is levied, as all the proceedings must be *ex parte*, and *extra judicial*, although if payment of the sum assessed is refused, it may be enforced by a sale of property; and in the absence of any law providing for a revision of the facts, it would seem that the trial by *certiorari* could only be upon the record, and that nothing extrinsic could be shown.

The 11th section of the charter provides for the assessment of taxes, and that any person aggrieved by the assessment, may complain to the Mayor and Aldermen, who shall consider, and reduce the assessment, if in their opinion it is too high, "and their decision on the subject shall be final." This evidently applies to the assessment of the value of taxable property, which may be made by assessors appointed by the corporation. In such cases, it is clear, resort for redress must be had by application to the Mayor and Aldermen, and that their decision is conclusive upon the rights of the applicant.

The tax complained of in this case, is of a different character. It is not an assessment of the value of property subject to taxation by assessors, but is a tax of one *per centum*, imposed by an ordinance of the corporation, on all goods, wares and merchandize sold in the city on commission, for the benefit of persons not residing in the city. The mode of ascertaining the amount of goods thus sold on commission, appears to be by application to the party himself, as it is recited in the execution issued to the marshal, that the sum demanded as the tax, was due on goods sold at auction, and on commission by them as given in by them, or their agent on oath. No citation or demand appears to have been made previous to the issuance of the execution, and no opportunity has been afforded, so far as we can learn from the record, for the correction of this matter, if the tax on sales by commission has been improperly levied.

The proviso to the 9th section of the charter, declares that nothing herein contained shall be so construed as to prevent

appeals to the circuit and county courts, in the same manner, and under the same rules and regulations, as appeals are taken from justices of the peace. This proviso is found in the section conferring the general powers of the corporation: giving it authority to levy and collect taxes, impose fines, and provide for the general police of the city. A fair construction of this clause, brings it, we think, within the purview of this case. If there had been a formal judgment, or a trial and decision of the facts disputed in this case, doubtless an appeal could have been taken from the judgment of the Mayor. The *certiorari* is a mere substitute for an appeal, and when allowed, presents for revision the same questions which would have arisen upon an appeal. It follows, therefore, that the court erred in refusing a trial upon the merits of the case, and its judgment must be reversed, and the cause remanded.

HODGES v. HOOLE.

1. A trustee of a married woman, to preserve her separate estate, is not responsible for medical services rendered to slaves, constituting her separate estate, they not being in his possession, or the services rendered at his request, and he never having promised to pay the value of the services.

Writ of Error to the Circuit Court of Barbour.

THIS was a proceeding instituted before a justice of the peace, and judgment being rendered against the plaintiff in error, Hodges, appealed to the circuit court, and gave bond with J. Buford as his surety. The case being removed to the latter court, the plaintiffs below declared against Hodges in *indebitatus assumpsit* for forty-five dollars; thereupon an issue was submitted to a jury, who returned a verdict in favor

of the plaintiffs for forty-five dollars, and judgment was rendered thereon against the defendant and his surety for the appeal.

A bill of exceptions was sealed at the instance of Hodges, from which it appears that he was a trustee of Martha R. W. Booth, a *feme covert*, and that the plaintiffs had rendered medical services to the amount of \$45 to slaves, part of the separate estate of Mrs. Booth, at her request. This was the only cause of action proved. The court charged the jury, that under the statute of this State requiring appeals from justices of the peace to be tried according to justice and equity, the plaintiffs were entitled to recover.

J. BUFORD, for the plaintiffs in error, insisted that a court of law could not entertain a suit against the trustee in respect to the estate of his *cestui que trust*. It cannot there appear what is the state of his account, or that his liability does not exceed the trust estate in his hands. *De Bard v. Smith*, is unlike the present.

CATO, for the defendants in error. The amount in controversy being less than fifty dollars, a court of chancery cannot entertain jurisdiction, unless justice most obviously demands it. [3 Stew. & P. Rep. 284; 3 Ala. Rep. 756.] In directing that the trial of cases originating before justices of the peace should be governed by liberal views of justice and equity, the object was to save expense to litigants, and in cases so unimportant, prevent a resort to equity. The terms of the statute, as well as its spirit, embrace a case like the present.

COLLIER, C. J.—The cases cited for the defendant in error lend no support to the judgment of the circuit court. In *Williams, et al. v. Berry, et al.* 3 Stewart & P. Rep. 284, the court cited the act of 1819, which provides that appeals from the judgments of justices of the peace shall be tried "according to the justice and equity of the case, without regarding any defect in the warrant, *capias*, summons, or other proceeding of the justice before whom the same was tried." *Further*, where the sum claimed does not exceed twenty

dollars, the plaintiff or defendant may be examined on oath, and judgment shall be given "as the right of the cause may appear" to require. These enactments, it was supposed, were intended to secure to the parties in suits under fifty dollars, originating before justices of the peace, all the justice and equity to which they were entitled; especially where the amount in controversy did not exceed twenty dollars. "If in any such cases," say the court, "the regular interposition of chancery can be allowed, we think it can only be where the sum exceeds that sum—excluding the testimony of the parties: and where, under peculiar circumstances, justice obviously demands the interference." In *Wood v. Wood, et al.* 3 Ala. Rep. 763, we say it had been considered that the statutes regulating appeals from justices of the peace, and the mode of trial in the higher court, secure to the parties all the justice and equity to which they are entitled; especially where the amount in controversy does not exceed twenty dollars. "Consequently, it has been holden, that if in any such case, chancery will interfere, it must be where the amount in controversy exceeds" that sum.

These cases, it is clear, are not decisive of the one before us. It is not intimated, that the statutes referred to, invested justices of the peace with jurisdiction of cases of exclusive equitable cognizance; but only, that in cases of which they had jurisdiction, they should be controlled by enlarged and liberal principles of justice. But conceding that these enactments were intended thus to extend the powers of these functionaries, and the question then arises, has the plaintiff shown any title to redress against the trustee of Mrs. Booth. He does not appear to have had the possession and control of her separate estate; nor does it seem to have been proved that the plaintiffs rendered their medical services at his instance, or that he promised to pay them. In the absence of all evidence of this kind, the defendants are not chargeable in any *forum*. The consent of an individual to the insertion of his name as a trustee in a deed settling property for the benefit of a married woman, cannot impose on him the obligation to pay for the preservation or safe-keeping of that property. True, he may extend his powers and obligations as a trustee, by the stipulations of the deed, or the control he is permitted

to exercise over the property. [2 Story's Eq. 242.] But the deed is not before us, and nothing else is shown than that the defendant was a trustee for a *feme covert*—merely for the purpose of upholding her interest against her husband and his creditors. In this posture of the case, the defendant is not liable to pay the plaintiffs' account. The judgment is consequently reversed, and the cause remanded.

HAZARD v. JORDAN.

1. A motion to dissolve an attachment on the ground that the cause of action does not warrant that process, can properly be entertained when a new or amended declaration is filed, setting out a cause of action not within the statute, if the motion is made within the time for pleading in abatement.
2. Process of attachment by one non-resident against another, will lie only for causes of action on which debt, or *indebitatus assumpsit*, could be brought.

Writ of Error to the County Court of Mobile.

ATTACHMENT by Hazard, against the goods, &c. of Jordan. The affidavit was made the 23d January, 1841, and describes Hazard as a resident of Rhode Island—averts that Jordan resides out of this State, so that the ordinary process of law cannot be served on him, is indebted to the plaintiff in the sum of \$1400—and has not sufficient property within the State of his residence, within the knowledge of the plaintiff wherefrom to satisfy the said debt.

Certain proceedings on this attachment were afterwards had, which resulted in judgment for the plaintiff, which was reversed in this court, and the cause remanded for further proceedings. [See *Jordan v. Hazard*, 10 Ala. R. 221.]

Upon the return of the cause to the county court, the de-

defendant obtained a rule for the plaintiff to show cause why the attachment should not be dissolved as not warranted by the laws of this State. This was done at the February term, 1847, at which term the plaintiff had previously asked and obtained leave to amend his declaration. The plaintiff in answer to this rule, insisted the attachment should not be dissolved—

1. Because of the lapse of time between the return of the attachment and the motion to dissolve.

2. That the defendant, at the time of the levy, was within the jurisdiction of the court, and employed counsel to appear and defend the suit.

3. That there has been a trial, verdict and judgment in the cause.

In addition to these reasons against the dissolution, the plaintiff's cause of action, as it appeared from depositions in the cause was submitted to show the ground for the attachment. From these it appears the plaintiff claimed that the defendant, in April, 1835, contracted with him to take all of certain iron in three flat boats upon a certain vessel called the *Ann Maria*, lying at New Orleans and bound for Providence. The boats containing the iron were taken alongside the *Ann Maria*, and the defendant commenced taking the iron on board. He left a quantity of the iron in the boats, and this he refused to take, complaining it would not pack well with the remainder of his freight. One of the boats, containing about forty tons of iron, of the value of \$1000, sunk, and was totally lost. There was ample time for the defendant to have taken the iron on board his vessel, and its loss was caused by his refusal to take it according to his contract. The expenses for taking out the remainder of the iron left was about \$100.

The amended declaration states the cause of action thus: "that the plaintiff, at the defendant's instance, and request, delivered to him certain iron, &c., to be by him conveyed from New Orleans to Providence, in consideration whereof the said defendant promised the plaintiff to take due care of the said iron, whilst he had charge of the same, yet the said

defendant disregarded his said promise," &c., and the declaration concludes by alledging a loss of the iron whilst the defendant had charge of the same, by reason of his default to take care of it, and by his negligence.

The court on this showing dissolved the attachment, and this is now assigned as error.

LESSESNE, for the plaintiff in error, insisted—

1. The attachment issued for a proper cause of action. [Searg. on Attach. 43; McClanahan v. McCarty; Fisher v. Consequa, 2 Wash. 382; Weaver v. Puryear & Williamson, at last term, and cases there cited.

2. It is too late, after such lapse of time to move for a dissolution of the attachment, for a defect in the cause of action. It should have been done at the first term—or at least before the trial of the cause before a jury. [Miltenerberger v. Lloyd, 2 Dall. 79; Mills v. Fraser and McFarland, cited in Searg. on Attach. 138.] To allow such a practice would be at war with the spirit of our statute, and rules, on the subject of pleading.

STEWART, contra.

GOLDTHWAITE, J.—1. A preliminary question was raised in the court below, whether it would entertain the motion to dissolve the attachment on account of the lapse of time since it was issued. As a general rule, it cannot be questioned, the party should not be permitted to lie by without raising the objection when the cause for it is apparent; but we apprehend the analogy which must govern the practice will be found in the rules which obtain in setting aside bailable process, on account of irregularities, and in pleading a variance between the declaration and the writ, when the former is not warranted by the latter. According to the course of practice in the King's bench, the writ is general, and the plaintiff is allowed to declare for any cause of action, but if bail is required, he will be held to declare according to the affidavit, or the bail will be discharged. So with us, the plaintiff is required to indorse his cause of action on the writ, and a variance between the declaration and

writ in this respect, would doubtless be good cause to set aside the declaration, [Ex parte Ryan, 9 Ala. 89,] but we apprehend the objection should be taken at as early a period as possible, and would not be allowed unless urged within the time that a plea in abatement should be pleaded for a variance between the body of the writ and the declaration. Indeed, this seems to furnish the precise rule in a case like the present. When the plaintiff declares for a cause of action for which the statute allows the process of attachment, and joins other causes, the defendant has no other remedy than to call upon the court to interpose for his protection. But there is no necessity for this when the declaration consists of counts for causes within the statute, and other defective counts. In such a case a demurrer to the defective counts must lead to their amendment or abandonment. It is only when the counts are amended that the cause exists for the interposition of the court by rule. Here, it will be seen by referring to the former report of the cause, the first declaration contained defective counts, and the declaration was amended by filing a new count in the court below. It is very clear, in our judgment, that the defendant upon an amended declaration, would be allowed to plead its variance from the writ, no matter when the amendment was made; [Comstock v. Meek, 7 Ala. Rep. 528;] and by analogy to this, it seems to us he was entitled to the rule for the plaintiff to show cause why his attachment should not be dissolved, for the reason that his cause of action was not within the statute.

2. Coming then to the merits of the motion, we do not think ourselves called upon to say how far the decision of Weaver v. Puryear, 11 Ala. Rep. 941, would control this case if the attachment was under the general law. This process issued by one non-resident against another, and the act which gives the remedy is greatly more limited than the general act. It provides, that when any person being a non-resident of the State, "is *indebted* to any person also a non-resident, either by *judgment, note, or otherwise*," the process may be allowed. We think the construction of these terms

cannot be extended beyond causes of action for which either debt or *indebitatus assumpsit* will lie. The cause of action disclosed alike in the count of the plaintiff's declaration, and by his proof is one for general and unliquidated damages only.

The consequence is, the plaintiff had no cause of action to warrant the process of attachment, and there was no error in dissolving it.

Judgment affirmed.

KAIN v. WALKE.

1. In a suit against the assignor of a note, by the assignee, the allegation, that the plaintiff commenced a suit against the maker, to the first court, &c. is sustained by the production of the record of a suit, commenced in the name of the payee, for the use of the plaintiff, if the judgment is still in force, unreversed.
2. The death and insolvency of the maker of a note, is a sufficient excuse for the failure to prosecute a suit against him, to a return of "no property found" by the sheriff.

Error to the County Court of Marengo.

ASSUMPSIT by the plaintiff in error, as assignee, to recover of the defendant in error as assignor, of a promissory note, made by Spencer Roane.

The declaration contains three counts. The first is in the usual form, alledging, that after the indorsement, "he commenced a suit by *capias*, issued the 10th April, 1839, founded upon said promissory note, and returnable to the then next term of Marengo county, being the first court to which suit could be brought after the indorsement of said note to the plaintiff," &c.

The second count offers, as an excuse for not returning the execution, "no property found," that after the execution was issued on the judgment against Roane, he gave security, and prosecuted a writ of error to the circuit court, and that the execution was returned superseded by the sheriff. That Roane died, and the writ of error abated, and that Roane was wholly insolvent after his death. The third count, in addition to these facts, alleges that the sureties of Roane to the writ of error bond, were insolvent.

The defendant demurred to the two last counts of the declaration, and his demurrer was sustained by the court.

Upon the trial, the plaintiff offered in evidence, under the first count of his declaration, the record of a suit instituted against the maker of the note by him, in the name of the payees of the note, for his use, which on motion the court rejected, and he excepted. This, together with the judgment of the court, on the demurrer, to the two last counts of the declaration, are now assigned as error.

JOHNS, for plaintiff in error.

Although a suit brought by the payee for the use of the indorser, is an acknowledgment that the legal title is in the indorser, yet an indorsement in blank has not that effect; but if it has, the indorser in this case has no right to take advantage of the error, and plaintiff ought to be permitted to explain the manner of suit and the nature of the indorsement. [Hunt, use, &c. v. Stewart, 7 Ala. Rep. 525; Burdick v. Green, 15 Johns. 247; U. S. v. Barker, Paines, 156; 1 G. & Johns. 175.]

The above are all cases between payee, who had indorsed the cause of action, and the maker. The maker in this case did not avail himself of this advantage, and no one else can. This being a blank indorsement, the indorser cannot in this suit avail himself of the error in the original suit. [2 Rich. 332; 15 Wend. 640; 11 Id. 27; 7 Cowen, 174; 11 Johns. (52) 57; 19 Pick. 43.]

The averment in the declaration that Roane died insolvent, and that his securities were insolvent, is sufficient excuse for not having a return of no property. [Thompson v. Armstrong, Breese, 23.]

No counsel appeared for the defendant.

ORMOND, J.—The case of *Bates v. Ryland*, 6 Ala. 675, is a conclusive authority, that the death and insolvency of the maker of a note, is a sufficient excuse for the failure to prosecute a suit against him, to a return of "no property found" by the sheriff. This is the excuse offered, for the omission in those counts of the declaration to which the demurrer was sustained, for the failure to alledge, that the statute condition had been performed. The court should not therefore have sustained the demurrer for this cause, and no other has been brought to our notice, or been observed by us, which would justify it. [See also *Clair v. Barr*, 2 Bibb, 255.]

The act defining the liability of indorsers, gives this right to the assignee, "provided suit be brought to the first court of the county where the maker resides, to which suit can be brought, and if he shall fail to sue the maker to the first court, as herein provided for, the indorsee shall be discharged from liability, unless suit shall be delayed by his consent." The right of the assignee, to recover of the assignor, is made to depend upon the bringing of a suit against the maker, to the first court, and in our judgment this condition of the statute is complied with, when a suit is instituted against the maker, upon the note, and a judgment obtained, upon which an execution could issue against him. The objection in this case, is understood to be, that the suit against the maker was not brought in the name of the assignee, but in that of the payee for his use. This mode of bringing the suit, might be necessary in the case of an irregular indorsement, and is not in our opinion a matter, which the assignor can object to. If a suit is in fact brought against the maker to the first court, and an execution returned no property found; or if a valid excuse is offered for the omission to produce the statutory evidence, afforded by the return of the sheriff, the statute is complied with. We think therefore, the allegation, that the plaintiff commenced a suit against the maker, is proved by the

production of the record, of a suit commenced in the name of the payee, for the use of the plaintiff.

What would be the effect upon the rights of the assignee, where a judgment so obtained, was reversed by the maker, we need not consider, as the judgment offered in evidence in this case is still in force. •

Let the judgment be reversed, and the cause remanded.

THE STATE BANK v. DENT AND PATTISON.

1. An allegation in a notice, that the bank would move for judgment on a bill dated the 4th January, 1840, that "it was purchased under the first section of the act of 1843," should be rejected as surplussage.

Writ of Error to the County Court of Tuscaloosa.

THIS was a summary proceeding by notice and motion at the suit of the plaintiff. The defendant pleaded to the notice *non asumpsit* and other pleas; thereupon the issues were submitted to a jury, but afterwards the plaintiff excepted to the ruling of the court, and then suffered a non-suit. It appears from the bill of exceptions, that the notice was addressed to the sheriff, and required him to serve the same on Dennis Dent, Charles S. Pattison, and James Hullum, and then proceeds thus: "Whereas, you are indebted to the President and Directors of the Bank of the State of Alabama, by a bill of exchange purchased under the first section of the act of 14th February, 1843, being an instrument for the payment of money, executed by one R. Caruthers, as drawer, you the said Dennis Dent, Charles S. Pattison, and James Hullum as indorsers, and the said R. Caruthers as acceptor, which bill is dated on the 4th day of January in the year one thousand eight hundred and forty," payable six months af-

ter date, and duly protested for non-payment on the 7th of July next thereafter. The notice is drawn out at length, and states every thing which it would be necessary to allege in a declaration, if the suit had been instituted in the usual form.

The defendants' counsel objected to the admissibility of the bill described in the notice, on the ground that the notice stated that the bill was purchased under the first section of the act of 14th February, 1843. The court sustained the objection, and excluded the bill from the jury: thereupon the plaintiff excepted.

P. MARTIN, for the plaintiff in error.

E. W. PECK, for the defendants in error.

COLLIER, C. J.—The act of 1846 confers upon this court the authority to revise a judgment of non-suit, which has been rendered under the circumstances disclosed in the record. The only question then, which is presented is, whether the bill described in the notice is so variant from that offered as evidence, as to have required its exclusion.

In *Griffin v. The Bank of the State*, 6 Ala. Rep. 908, we said, the notice issued at the suit of a bank against its debtor is process to bring in the latter to answer. But after the motion indicated by it is made, it is then to be regarded as a motion in writing, identifying the debt sought to be recovered, and against which the defendant may urge any ground of defence recognized as available according to legal forms. The notice then is assimilated to a declaration—it subserves the purpose both of a writ and declaration, though it may not be so formal as the latter. Yet it should set out the evidence of indebtedness with such precision that the defendant may know, from an inspection of the notice itself, against what he is called on to make defence. It is therefore allowable for the defendant either to demur to the notice, or plead to issue. And in *Crawford v. The Branch Bank at Mobile*, 7 Ala. R. 205, it was said, that *Lyon v. The State Bank*, 1 Stew. Rep. 442, determined that a notice at the suit of a bank, against its debtor, is sufficient, if it identifies the debt

with reasonable certainty, though it has not the precision of a declaration: *Further*, that this case has been followed in practice, and such notices have been considered unexceptionable, although they do not contain the extrinsic allegations that are essential to a declaration.

The statement in the commencement of the notice, that the bill was purchased under the act of 1843, is certainly not descriptive of the bill on which the motion was submitted. It was a matter independent and extrinsic, and could have no other effect, if true, than to entitle the bank to *thirty per cent. damages* upon the dishonor of such a bill; for if the bill was taken in renewal or settlement of a pre-existing debt, instead of the remittance of funds to pay principle or interest upon State bonds, then the damages would be according to the law previously applying. This being so, it is difficult to perceive any sufficient reason for rejecting the bill as evidence.

If the statement in the notice, that the bill was purchased under the statute, threw upon the plaintiff the *onus* of proving it, then the objection for a defect of proof should have been raised after the plaintiff had closed his proof. And if delayed until then, there can be no question but it should have been overruled. We have seen that greater indulgence is allowed in proceedings of this character, than where the plaintiff declares in the usual mode of prosecuting actions, and that if the notice informs the defendant of what he is called on to answer, although it does not contain the allegations which are essential to a declaration, it is quite sufficient. The same rule we think must be applied where the notice, in addition to informing the debtor for what cause a motion will be made against him, states an independent and repugnant fact not essential to his right to recover. And in such case the plaintiff is entitled to recover without proof of the unnecessary allegation.

But if the strictest rules of pleading are applied, they will not support the ruling of the county court. It is said to be well settled,* that where a declaration contains impertinent matter, foreign to the cause, it need not be proved; and that immaterial averments do not at this day require precise proof, unless the failure of such evidence would occasion a vari-

ance between the pleadings and the proof—in fact such evidence is not necessary, unless the subject of the averment is a record—a written instrument, or an express contract. [Pharr & Beck v. Bachelor, 3 Ala. R. 237.]

If matter wholly foreign and impertinent to the cause, in respect to which no allegation was necessary, be stated, it will be rejected as surplussage and need not be proved, *utile per inutile non vitiatur*; except where, by the unnecessary allegation, the plaintiff shows that he has no cause of action. So a superfluous allegation, repugnant to what was before alledged, is void, and will be rejected; and even if the inconsistent matter precedes a proper statement of the cause of action, it will be disregarded, if its rejection will not leave the declaration in other respects imperfect. [1 Chitty's Pl. 3 Am. ed. 232 to 235; Step. Pl. 377; Bank U. S. v. Smith, 11 Wheat. R. 171; Gould's Pl. 16; Bristow v. Wright, Doug. R. 665; Savage v. Smith, 2 Black. R. 1101; The Friendship, 1 Gall. R. 45.]

The date of the bill, and the time of its maturity clearly show, that it was impossible it could have been purchased under the act of 1843—the statement of this fact is wholly disconnected with what follows in respect to the bill, its date, non-payment, &c., and may be stricken out without impairing the cause of action. It is immaterial and inconsistent with the ground upon which the motion was made, and need not have been proved to entitle the plaintiff to recover, and cannot in any manner prejudice. [2 B. & Cresw. R. 2.]

The term *surplusage*, in pleading, comprehends whatever may be stricken from the record, without destroying the plaintiff's right of action. [1 Greenl. Ev. 58; 1 Saund. on Plead. & Ev. 415-6; 3 Stark. Ev. 1534; Hutchison v. Patrick, 3 Miss. Rep. 65; Alvord v. Smith, 5 Pick. R. 232; De Forest v. Brainerd, 2 Day's Rep. 528.]

Thus we see, that if instead of a notice, the statement of the cause of action were a declaration consequent upon a writ, the plaintiff might, upon proof of the dishonor of the bill, notice, &c., recover, without offering evidence that it had been discounted under the act of 1843—that statement being stricken out, or disregarded, would not affect the right of action on the bill. The recovery would be graduated by the

amount of the bill, interest, and damages according to the rate prescribed in ordinary cases. The statement of the circumstances under which the plaintiff became the proprietor, was alledged with the view of increasing the damages; and it is well settled, that the failure to prove matter of aggravation, set out in the declaration, will not deprive the plaintiff of the right to recover for the injury actually sustained.— These principles we have said are well founded when applied to a declaration, and again repeat that much greater indulgence is shown to a notice. The consequence is, that the judgment is reversed—the non-suit set aside, and the cause remanded.

GILBERT v. BRASHEAR AND GOOCH.

1. When the hearing of a claim against an insolvent estate is continued to a time beyond that fixed in the first instance for the settlement, the creditor's affidavit (for the omission of which exception is taken) may be filed at any time before the bearing.

Writ of Error to the Orphans' Court of Shelby.

THE estate of F. Young was declared insolvent, upon the representation of Brashear and Gooch, its administrators, on the 27th December, 1845. The plaintiff filed his account against the estate, in writing, within the six months next thereafter, to which was appended an affidavit, purporting to be made by him before one William J. Flagg, a justice of the peace in the state of Connecticut, on the 1st November, 1844, and declaring the same account to be just and true.

The administrators filed their exceptions to the allowance of the account, on the ground that it was not filed verified by

the oath of the plaintiff within six months after the estate was represented insolvent, &c., and was not due, &c.

The trial of the exceptions was continued from time to time until December, 1846, when, in addition to the original affidavit, filed as before stated, plaintiff produced another, made before the same justice of the peace, on the 21st November, 1846, whose certificate was accompanied with that of the secretary of state of Connecticut, under the seal of state, shewing his official character. This affidavit was filed the 16th December, 1846.

The court, upon the hearing of the claim, rejected it, on the ground that the first affidavit was not shewn to be made before a justice of the peace; and the second was not filed within the six months, although it was so before the hearing. The rejection of the claim is the only error assigned.

T. J. CLARK, for the plaintiff in error.

POPE, *contra*, cited *Hollinger v. Holly*, 8 Ala. Rep. 456; *Brown v. Easley*, 10 ib. 566.

GOLDTHWAITE, J.—The decision in *Hollinger v. Holly*, 8 Ala. Rep. 454, settles, that the omission of the creditor's affidavit, is a sufficient ground of exception to prevent the allowance of his demand against an insolvent estate, but this defect may be supplied, after exception taken, if the affidavit is made before the time set for hearing. [*Brown v. Easley*, 10 Ala. Rep. 566; *Shortridge v. Easley*, ib. 520.] In this case, although the second affidavit was filed after the time set in the first instance for hearing the claims, yet as that was extended by subsequent orders of the court, as to this particular claim, we must consider the verification as within the previous decisions referred to. This being the case, and as the second affidavit is not objected to, we are relieved from considering how far credit must be given to an affidavit made in another state, and the character of the individual administering the oath, not being certified under the seal of the state.

Hallett and Walker, ex'rs, v. The Branch Bank at Mobile.

We think the court erred in rejecting the claim on the ground that there was no affidavit filed within proper time.
Reversed and remanded.

**HALLETT & WALKER, EX'RS OF J. KENNEDY, V. THE
BRANCH BANK AT MOBILE.**

1. A notice of the non-payment of a promissory note, personally served on the executor of an endorser of the note, or which is shown to have come to his hands, although it may come from a notary protesting the note, will be sufficient to withdraw the claim from the influence of the statute of non-claim, if it describe the note with accuracy, and informs the personal representative, who the holder is, and that he looks to him for payment.—
ORMOND, J., dissenting.

Error to the Circuit Court of Mobile.

ASSUMPSIT by the defendant in error, against the plaintiffs in error, as executors of Joshua Kennedy, endorser of a promissory note.

Upon the trial of the cause, as appears from a bill of exceptions, the plaintiff introduced Edwin Rust, a notary public, who proved, that he either gave the notice personally, or left the notice of non-payment, and protest, mentioned in his protest, at the office of Wm R. Hallett, at the time mentioned in the certificate of protest; but he could not state to whom it was directed, whether to Kennedy or Hallett, but that either Hallett or Kennedy's name, was on it. At the time this notice was alledged to have been given, Kennedy was dead, and Hallett and Walker had qualified as his executors. The certificate endorsed upon the protest, referred to in the evidence of the notary, is in these words: "Notices of protest given to the endorser the same day."

The defendants moved the court to instruct the jury, that

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the evidence offered of notice of protest, though it might be sufficient evidence of that fact, was not sufficient evidence of a presentment of the claim to the executor, to prevent the bar of the statute of non-claim, which the court refused, and instructed the jury, that the notice of protest by the notary, was a sufficient evidence of presentment to the executors, to take the case out of the statute of non-claim; and that if Hallett got the notice, no matter how directed, they could on this proof, find that the claim was sufficiently presented thereby to the executors, so as to avoid the plea of the statute of non-claim. 'This was excepted to, and is now assigned as error.

STEWART, for plaintiff in error. The appellants contend that the notice of protest by the notary, had not the effect of a presentment of the claim; and that the notary had no authority to make such a presentment by virtue of his office. [See Jones v. Lightfoot, 10 Ala. 17; Boggs v. Br. Bank, ib. 970; Badger v. Steele, ib. 944; Thrash v. Sumwalt, 5 ib. 13; Hollinger v. Holly, 8 ib. 454; Travis v. Tartt, 8 ib. 577; Bigger v. Hutchings, 2 Stewart, 448; Kenan v. Saxton, 13 Ohio 41; P. & M. Bank v. King, Upson & Co. 9 Ala. Rep. 279, as to agent.]

CAMPBELL and LESSESSNE, contra. The defendant contends, that a notice of a protest of a note, endorsed by his testator, served upon the executor *personally*, fulfils the requisitions of the statute of non-claim. The object of the notice is to inform the executor that a contingent liability of his testator has become absolute, and to warn him that the estate is looked to for payment. The object of a prosecution is to give the same *information*, and to enable the executor to take the necessary precautions. [2 Wms. on Ex'rs. 678, 679; 2 Smedes & M. 403.] The proof of the claim, it was not necessary to submit to the executor. [Jones v. Pharr, 3 Ala. 283.] This court has decided that the notice afforded in process, served upon the executor, would, in certain cases, be equal to a presentment. The reason is much stronger in the case before the court. [10 Ala. Rep. 17.]

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ORMOND, J.—The question involved in this case, has been recently fully considered by this court, in the case of Jones v. Lightfoot, 10 Ala. 17, and Boggs, Ex'r, v. The B. Bank, Ib. 970. These cases hold, that knowledge of the fact of the existence of the debt, by the personal representative, no matter how full, or perfect it may be, will not dispense with a presentment of the claim to the personal representative, as required by the statute. The reason upon which these decisions are based, is, that without a presentment, the personal representative cannot know that the estate he represents, is looked to for payment of the debt; yet that such knowledge is essential to him, because he may be called on after the lapse of eighteen months for distribution of the estate, and can only refuse to distribute the estate, by showing outstanding claims against it. But, as mere knowledge of the existence of a claim against the estate, by the personal representative, would, if sufficient to excuse him from distributing the estate, postpone such distribution for an almost indefinite period, it was evident the legislature designed, that a presentment of the claim, to the personal representative, should alone be sufficient proof, that it would be asserted against the estate, and justify him in retaining assets to discharge it, in the event it should be ascertained the estate was liable to pay it.

It was also admitted, there were certain acts, equivalent in legal estimation to a presentment *in pais* to the personal representative; such as the prosecution of a suit within the time required by law for the presentment, or the revival of a suit, or judgment, by *scire facias* against him, within the same period; as these were unequivocal acts, and notice to the administrator, not only of the existence of the claim, but of an intention to assert it against the estate. The potency of this last mentioned ingredient, in any act, which is relied on as an equivalent for an actual presentment *in pais*, is shown by the case of Boggs v. The B. Bank, *supra*; where it was held, that a judgment obtained against the personal representative, which was afterwards vacated, was not equivalent to an actual presentment *in pais*. And in like manner, in the old case of Bigger v. Hutchinson, 2 Stewart, 448, that the suing out of a writ, within the time required by law,

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but which was not prosecuted to judgment against the administrator, would not satisfy the terms of the statute.

I am unable to distinguish these cases from the present. Conceding that a notice to the personal representative, of the dishonor of a note, upon which his testator, or intestate, was an indorser, does inform him, as it doubtless does, of the existence of the claim, it gives him no information whatever of another fact, equally as important, that the estate he represents is looked to for its payment; and if this is wanting, it is nothing more than mere knowledge of the existence of the claim, which we have seen is insufficient. Indeed, notice to charge a party to a bill, or note, of its dishonor, may be, and in most cases is given, through the medium of the post office; and if placed in the post office at the proper time, will be evidence of notice, whether it reaches the party intended to be notified or not. Nor is a notice of the dishonor of a bill, or note, unequivocal proof that payment is demanded. The money may be made from other parties to it, primarily liable to the holder, and in such a case, the notice would be wholly inoperative.

For these, and other reasons which might be adduced, I am of the opinion that such a notice is not equivalent to a presentment to the personal representative, which was not only designed by the statute to give him notice of the existence of the claim, but also to apprise him that payment was demanded; and to afford him an opportunity of paying it, if he thought proper. But my brethren think that a notice personally served on the administrator, or which is shown to have come to his hands, although it may come from a notary protesting the bill, or note, will be sufficient to withdraw the claim, from the influence of the statute of non-claim, if it describe the bill, or note, with accuracy, and informs the representative who the holder is, and that he looks to the administrator for payment. That is substantially, what the presentment of a demand to the administrator should contain, and that it makes no difference, that it comes from the notary, as he is in that capacity authorized to receive payment.

We have been referred to the case of *Helm v. Smith*, 2 *Smedes & M.* 403, decided by the supreme court of Mississippi, upon a statute similar to ours, where the doctrine as-

serted by my brethren, is certainly fully sustained. The facts of that case, were, that a notice of the dishonor of a mercantile instrument, was sent by mail directed to the indorser, who was dead at the time the notice was sent, but the post office to which it was directed, was the same at which the executor of the deceased was in the habit of receiving his letters. There was no positive proof that the notice came to the hands of the executor, but there were facts in evidence from which such an inference might, without impropriety, have been drawn by the jury. The court held, that such a notice, if received by the executor, was a sufficient presentment of the claim to the executor, to bar the statute of non-claim. They came to this conclusion, because they held, the whole purpose of the statute, was to give the personal representative notice of the *existence* of the claim. "It would therefore, (in the language of the court,) be legitimate, to show a notice of such a claim, to an executor or administrator, by any legal evidence, which would establish the fact, of their *knowledge of its existence*, to the satisfaction of a jury, because the design of the statute, would thereby be accomplished."

Upon this theory of the design of the statute, the decision cited was certainly correct; but that is not our view of the object the Legislature had in view in its passage. This court, by a series of decisions, commencing under its former organization, and continuing down to a very recent period, has held, that knowledge of the existence of the claim by the personal representative, was not of itself sufficient, to arrest the operation of the statute. Thus, in the recent case of *Jones v. Lightfoot*, 10 Ala. 24, this court say, "if knowledge, merely, of the existence of the claim, by the personal representative, is sufficient in any conceivable case, (except where the debt is due to the personal representative himself,) it must be in this." Yet the court resisted the strong temptation, which constantly assails all courts, of bending the law to suit the abstract justice of the case, and adhered to the rule, *that knowledge merely* was not sufficient; and the debt was lost, although the question arose in a suit in equity, and it was shown that the executors, who were the sons of the deceased, knew all about the claim, had consulted and retained

counsel to defend the suit, if revived against them, and had in fact kept in reserve a sufficient sum to pay the debt, if the suit was revived and went against them.

That a notice such as this, is not equivalent to a presentment, is manifest, from its wanting the essential ingredient, upon which all our decisions hitherto have been based—*the information that the estate is looked to for payment*. I do not understand, that a notice to charge a party to a negotiable instrument, must in express terms inform him, that he is looked to for payment. His liability to pay, is a legal consequence of his being notified of the dishonor of the paper. But if it contained this express language, it would not in my opinion vary the case. It by no means follows, that because a party to a bill, is notified of its dishonor, that he will ever be called on for payment. The habit is, for the holder to notify all the parties to a bill, but if payment is made by a prior party on the instrument, the notice would be entirely nugatory. How, it may be asked in such a case, is the administrator to know, that the estate he represents will ever be called on for payment; and how can he refuse, if called on by the distributees to make distribution, because he has received such a notice? What length of time must the estate be tied up, waiting this possible contingency?

The presentment contemplated by the statute, is one which will not only inform the administrator that the estate is looked to for payment, but such as would also give him the power, if he had the means, to pay the debt. I will not stop to controvert the position, that a payment to the notary would be sufficient. He has the note for the purpose of demanding payment, and of course may receive the money if tendered. In this particular he is like any other agent, who has the note for collection. But if payment is not made, and he protests for non-payment, and gives notice, his agency is at an end; he has no longer any right to receive the money. He returns the bill to his principal, and his agency is at an end. It would be a most alarming doctrine, that the notary was invested with power to receive the money, upon a note, or bill, after protest and notice of its dishonor. This is a point which it seems to me is too clear for argument, and

it appears to result as a necessary carollary from this, that the information derived from the notice, is knowledge merely, that such an instrument exists, upon which the deceased was a party. It is not a presentment of the note for payment, because the administrator cannot pay it if he desired to do so.

For these reasons my opinion is, that the charge of the court was erroneous, and the judgment should be reversed : but the majority of the court thinking otherwise, it must be affirmed.

CRUMPTON v. NEWMAN.

1. To constitute the offence of obstructing process, in a criminal point of view, there must be an active opposition ; not merely taking charge of a debtor's property, keeping it out of view, and refusing when called on by an officer to place it within his reach.
2. A warrant, which recited, that W C did oppose W A, a constable, in the execution of civil process, by concealing, and keeping concealed, the property of one James Frost, is a nullity, and the party who caused it to be issued, as well as the officer who acted under its authority, are liable in trespass to the party arrested.

Writ of Error to the Circuit Court of Lowndes.

THIS was an action of trespass at the suit of the plaintiff in error, alledging an assault and battery upon, and imprisonment of him, by the defendant, without reasonable and probable cause, &c. On a trial before the jury, the plaintiff read as evidence an affidavit and warrant as follows, viz : "The State of Alabama, Lowndes county. Personally came before me, R. S. Fletcher, an active justice of the peace in and for said county, Morris Newman, who being duly sworn, deposeth and saith, that on the 21st day of March, A. D. 1846, one William Crumpton, of said county, did oppose William

Atkinson, a constable of said county, in the execution of civil process by concealing and keeping concealed, the property of one James Frost, of the county aforesaid. Sworn to and subscribed before me, the 21st day of March, 1846.

MORRIS NEWMAN.

R. S. FLETCHER."

"The State of Alabama, Lowndes county. To any constable of said county, greeting: Whereas, complaint has been made to me, R. S. Fletcher, an acting justice of the peace in and for said county, on the oath of Morris Newman, that on the 21st day of March, 1846, one William Crumpton of said county, did oppose William Atkinson, a constable of said county, in the execution of civil process, by concealing, and keeping concealed, the property of one James Frost, of the county aforesaid. These are therefore to require and command you, by the authority of the State of Alabama, to arrest the said William Crumpton, and bring him before me or some other justice of the peace for the said county, at my office, on the 31st inst., to answer the said complaint, and further to be dealt with according to law. Given under my hand and seal, this the 21st day of March, 1846.

R. S. FLETCHER, (seal.)

The affidavit was made and subscribed by the defendant, and he delivered the warrant to Atkinson, the constable, to be executed. Other testimony was adduced by the plaintiff, showing that the christian name of Crumpton was inserted in the affidavit and warrant, after the former was made and the latter was delivered to the constable. It was also proved, that the plaintiff, when called on by the constable, refused to inform him where a wagon, supposed to be the property of Frost, could be found, and that the wagon was the property of another person.

Upon this evidence, the court charged the jury, that if the evidence adduced by the plaintiff was all true, the action was misconceived, and should have been case; and in the present action the plaintiff could not recover. Thereupon the plaintiff's counsel asked leave to withdraw the cause from the jury, take a non-suit, and except to the ruling of the court according to the statute, which was granted; and the foregoing facts and charge are presented to this court by bill of

exceptions—a judgment having been rendered against the plaintiff for costs.

B. F. PORTER and F. H. BRODIE, for the plaintiff in error, insisted, that the warrant was a nullity, and afforded no protection to the defendant who caused it to be issued and executed. [1 Chit. Pl. 211; Clay's Dig. 430, § 20; 1 Hale's Pleas of Cro. 577; 2 Bla. Rep. 846.]

No counsel appeared for defendant.

COLLIER, C. J.—The 20th section of the 5th chapter of the penal code, enacts, that “if any person shall knowingly and wilfully resist or oppose any officer of this State, in serving or attempting to serve, or execute, any legal writ or process whatsoever, he shall, on conviction thereof, be fined not less than fifty, and not exceeding one thousand dollars.” [Clay's Dig. 430, § 20.] It is perfectly clear, that the mere concealment of property of a debtor, or the refusal to inform an officer who has an execution against his estate, where it may be found, does not amount to an offence under this statute, or at the common law. To constitute the offence of resisting or obstructing process in a criminal point of view, there must be an active opposition; not merely taking charge of a debtor's property, keeping it out of view, and refusing when called on by an officer to place it within his reach. This is so clear a principle of law, that it is unnecessary to cite authority for its maintenance.

The question then is, is the warrant under which the plaintiff was arrested, a nullity, so that the arrest and detention under its authority was an unlawful imprisonment? In *Duckworth v. Johnston*, 7 Ala. Rep. 578, a warrant was issued by a justice of the peace, requiring the arrest of the plaintiff, upon the oath of the defendant, that the plaintiff “had property in his hands, in a fraudulent condition.” We there said, that the “mere fact that one is the custodian of property, in fraud of the rights of others, or holds it to the prejudice of his own, or third persons' creditors, will not subject him to proceedings at the instance of the State.” *Further*, it must

be intended that the warrant recites the substance of the accusation, and upon this hypothesis it is defective ; for although it be true, the offence is not punished criminally. In that case, as well as the present, the warrant conformed to the affidavit and there was no variance of which the defendant could avail himself. It was added that "the case stated in the warrant, being without the jurisdiction of the justice of the peace, it necessarily follows the warrant is void for defects apparent on its face." Many authorities are cited by the court, from which these conclusions are deduced. Where an injury is done to a person by the regular process of a competent court, *case* is said to be the proper remedy, and *trespass* is not sustainable ; but where the warrant is a nullity, it should not be executed, and the party who caused it to be issued, as well as the officer who acted under its authority, are liable in trespass to the party arrested.

The case cited, is a satisfactory authority to show, that the present action is properly conceived. We have seen that the warrant does not disclose an offence known to the law. It had merely stated that the plaintiff resisted or opposed the execution of process, it perhaps would have been sufficient ; but in developing the accusation it goes beyond this, and shows that what is called a resistance of the action of the constable does not constitute a criminal offence. The entire proceeding indicated by the affidavit and warrant was then *coram non judice*: consequently the judgment is reversed and the cause remanded.

PICKETT v. STEWART.

1. Where a suit is brought for the use of another, on a note which, at the trial, appears to be indorsed in blank by several indorsers, and also by the nominal plaintiff, the several indorsements may be filled up at the trial, so

as to correspond with the declaration, and that of the nominal plaintiff stricken out.

Writ of Error to the Circuit Court of Lawrence.

DEBT by Stewart, suing for the use of Thompson, as the indorsee of a promissory note, against Pickett, as one of the firm of Pickett & Barker, its makers. The defendants pleaded several pleas, to which demurrers were sustained, but which are unnecessary to be noticed here, as the defendant does not raise any point upon them in his brief.

At the trial, the plaintiff offered in evidence the note described in his declaration, on which, were the following indorsements, in blank, to wit: Stephen Pickett, Picket, Barks & Co., Wm. Stewart, (the plaintiff.)

The court sustained the defendant's objection to reading the note, and the plaintiff then proposed to fill up the two first indorsements, so as to correspond with the allegations of the declaration. Also, to strike out the indorsement of his own name, This was allowed against the defendants objection, who thereupon excepted.

The striking out of this indorsement, and the sustaining the demurrers to the pleas, is now assigned as error.

COOPER, for the plaintiff in error, insisted, that by the blank indorsement of Stewart, the legal interest in the note passed to Thompson, the holder, and the action should have been in his name, instead of being for his use. The suit being for the use of Thompson, estops the plaintiff from insisting the note was returned. [Chitty on Bills, 230; Johnston v. English, 1 Stewart, 169; Bowie v. Duvall, 1 G. & J. 175; Hunt v. Stewart, 7 Ala. Rep. 525, and cases there cited.]

No counsel appeared for the defendants in error.

GOLDTHWAITE, J.—The distinction between this case and those of Johnston and English, 1 Stew. 169, and Hunt v. Stewart, 7 Ala. 525, is, that here the indorsement is in

blank, whilst in those, it was filled up to the identical person for whose use the suit was instituted. The decisions proceed on the ground, that the indorsements vested the legal interest in the note in the person named, and the suit being for his use, rebutted the presumption which otherwise would arise from finding the note in the hands of the indorser. Here there is nothing to rebut the presumption, that the note has been returned to the indorser, unless it is that the suit is for the use of another, who for any thing which appears, is a stranger. In a very early case, the general commercial rule is recognized that a note may be sued in the name of one who appears on its back as indorser, and the presumption arising from finding the note again in his possession, is said to be, that the indorsement was made to facilitate collection, or for some other purpose, and that the note had been returned to the owner. [Pitts v. Keyser, 1 Stew. 154. To the same effect is Dugan v. U. S., 3 Wheat. 182.] It must be conceded there is no very clear, or well defined line of distinction between these cases, but we think, as the whole notion against the right of the holder of the note to bring the action against the *prima facie* intendment arising out of the indorsement to another, rests on presumption, it would be well to adhere to the one class or to the other. The present case does however present a broad ground for a distinction, as the indorsement is in blank, and the holder has the legal right to strike it out, or fill it up, as he chooses. No one can interfere with this right, and therefore the objection to his doing so, becomes a mere technical objection.

We think the circuit court committed no error in allowing the indorsements to be filled up, and that of the plaintiff stricken out at the trial.

Judgment affirmed.

SIMERSON v. THE BRANCH BANK AT DECATUR.

1. A purchase made under a decree in chancery, foreclosing a mortgage, is *prima facie* valid, against a subsequent judgment creditor of the same debtor. But if the debt of the subsequent judgment creditor, existed at the time of the rendition of the decree in chancery, under which he claimed, the *onus* is cast on him of showing, that the decree was rendered for a debt due from the debtor to the complainant, he being also the purchaser.
2. The retention of possession by the mortgagor of personal property, after the law day has passed, is not necessarily a badge of fraud. If the property be suffered to remain with the mortgagor, by the mortgagee, a considerable time, it is a circumstance from which fraud may be inferred, if not satisfactorily explained. If he proceeds with reasonable diligence to foreclose his mortgage, no presumption whatever of fraud arises from the fact, that whilst the proceedings are in progress, the property is suffered to remain with the mortgagor.
3. Where there has been a public sale of personal property, the purchaser may leave it with the former owner, upon a contract, or from motives of benevolence, and if the act is *bona fide*, it will not be liable to the debts of the former owner.

Error to the Circuit Court of Mobile.

TRIAL of right of property, in which the plaintiff in error was claimant. The bank obtained judgment at the September term, 1845, of Mobile circuit court, against G. Lyon and James W. Roper, upon which a *fi. fa.* issued, which was levied upon two slaves, Patrick and Miles, as the property of Roper, and a *venditioni exponas* issued on the 30th October, 1846, directing the sheriff to sell the slaves, when the plaintiff in error interposed his claim.

The plaintiff, to establish his case, gave evidence conducting to prove, that the slaves levied on were in possession of Roper at the time of the levy, and had been for many years previous.

The claimant then produced a copy of the record, and proceedings of a suit in chancery, between himself and Roper, commenced in March, 1843, for the foreclosure of a mortgage

made by Roper, to indemnify him as a surety. The bill set forth the mortgage, that the claimant had paid the notes specified therein, and praying a foreclosure and sale. The answer of the defendant Roper, confessing the allegations of the bill—the evidence of the debt due the complainant—the master's report, and decree of sale—the sale in March, 1844, pursuant to the decree, and a purchase of the slaves by the complainants; a deed from the master, and confirmation by the chancellor.

He also produced the mortgage executed by Roper, the 20th September, 1841, made to secure the claimant, and J. B. Hogan, as his sureties for the payment of certain debts, which are thus described in the mortgage: Note for \$4898, due June 3, 1842; one for \$1141 82, due 4th May, 1842; one for \$2167, due 9th December, 1841, and a note for \$2700, due 28th November, 1841. Upon these notes the deed recites, that the claimant and Hogan were sureties.

The claimant also read in evidence, a power of attorney, made in January, 1844, constituting Roper his general agent in Mobile, and proved that he resided about forty miles from Mobile, and that the slaves levied on, worked with others at a brick yard, included in the mortgage, and sold under the same decree, and at a very short distance from Mobile, and that for a short time, during the summer of 1844, a person was employed by the claimant, to superintend the slaves at the brick yard.

It was proved that one of the slaves levied on, had been for a short time after the sale in the employ of the claimant to build a chimney for him. There was no evidence that the claimant had exercised any control over the slaves, or that they ever were in his possession, until after the sale by the master in chancery, or that they ever were withdrawn from his control, before the sale; but the proof conduced to show, that they remained in his possession. There was no evidence that the slaves had been in the possession of the claimant, after the master's sale, except the slave previously referred to.

There was no evidence of the *bona fide* character of the debts mentioned in the mortgage, except the recitals in it, the proceedings in the court of chancery, and the evidence

of debt there filed. It was proved, that the brick yard was very near the residence of Roper, that he had managed it for several years, controlling the yard, and delivering the brick, to those who purchased them; the claimant being seldom at the yard. Roper had been insolvent for many years.

The court charged the jury, that in cases of absolute sales of personal property, where the possession remained in the vendor unexplained, and he continued to control the property, the law presumed fraud; and that the law was the same in the case of a mortgage of personal property, after forfeiture of the mortgage; that if after the forfeiture, the mortgagor remained in possession of the property, controlling and using it, the law presumed fraud until such possession was explained; and if not explained, and he was in failing and insolvent circumstances, such possession was conclusive evidence of fraud.

That if the possession of the mortgagor from the time of the forfeiture of the mortgage, to the time of foreclosure, had been accounted for, it was not necessary to account for the possession after the foreclosure, and sale, if the sale was public, and the proceedings in chancery and the sale *bona fide*.

At the request of plaintiff's counsel, the court further charged the jury, that in order to make the mortgage available, against the plaintiff, it was necessary the jury should be satisfied, it was executed for a good consideration; that the recitals of the deed itself, coupled with the production of the promissory notes therein mentioned, was not sufficient evidence of a consideration, but that the claimant should show by other evidence, that the responsibility incurred by him, for defendant, was actual and *bona fide*.

The court also charged, that if the claimant purchased the slaves, at a fair sale by the master, for a valuable consideration, the fact that they remained in the possession of the defendant in execution, after the sale, was no evidence of fraud. But although there might have been such a sale, yet if it was shown that the defendant in execution, *prior* to the sale, and between the forfeiture of the mortgage and the sale, had remained in undisturbed possession of the property, it was presumptive evidence of fraud, the law casting the *onus* upon the complainant, of repelling the presumption, and showing

that it was fair, and *bona fide*; and if this was not done, the presumption was conclusive.

These matters were excepted to, and are now assigned as error.

CAMPBELL, for plaintiff in error. 1. The plaintiff in error contends, that holding, as he does, a conveyance of the slaves claimed under a decree of sale, *rendered by the court of chancery—of a date prior to the levy—and of any evidence of debt against the defendant in execution, submitted to the jury—* that he was not required to support the decree by evidence of the *bona fides* of the transaction on which it was founded. That this proposition is true, although the suit in chancery was between the claimant and defendant in execution.—[Goodgame v. Cole & Co., at this term; 5 Pick. 388; 4 ib. 460; 1 Stark. Ev. 241-2.]

2. That the retention of the slaves by the mortgagor, after the law-day had passed, though unexplained—and though no proof of the consideration of the mortgage was given, except the acknowledgments of the mortgagor, and the production of the evidences of debt specified in it, was not conclusive evidence of fraud in the sale of the master, and did not vitiate his conveyance—all these transactions taking place before the levy, or the contract between the plaintiff in execution and the defendant. [Bartlett v. Williams, 1 Pick. 288; Sydnor v. Gee, 4 Leigh's R. 535; 2 Mason, 252.]

3. That a public sale of slaves by the master in chancery, *for a fair and valuable consideration*, is not vitiated by the fact, that prior to the sale, and between the sale and the law-day of the mortgage on which the decree of sale was founded, possession remained with the mortgagor. [4 N. H. 469; 3 Met. 332.]

4. That an execution creditor, whose execution came to the hands of the sheriff two years and more after such a sale, and is founded upon a judgment eighteen months after, and who gives no proof of his debt, cannot avail himself of the fact that possession remained with the mortgagor between the law-day and the sale—*it being conceded, as it is, in the instruction given*, that the sale by the master was for a fair and

valuable consideration, and public and *bona fide*. [Goodgame v. Cole & Co., above cited.]

5. That the court was not authorized to reject the evidence of the notes described in the mortgage *as produced* by the claimant, and the admissions by the defendant in execution that the liability of the claimant was for his accommodation, it appearing that the admissions were made long anterior to the debt of the plaintiff. The production of the notes by the claimant, was *prima facie* evidence that he had paid them. On some of these notes he was an indorser.

6. A suit for a foreclosure of a mortgage, brought to the first court after the forfeiture, and prosecuted to a decree and sale, with all possible expedition, repels the presumption of fraud that arises from the possession of the mortgagor after the law day. These facts being apparent from the record, the charge of the court was erroneous on that point. [7 Dana, 225.]

7. That no *legal* presumption of fraud arises from the possession of the mortgagor, after a suit has been commenced for a foreclosure of the mortgage, unless the jury should find the suit to have been collusively conducted. The court has no right to assume *that* as a fact in the case, and to require extrinsic evidence of fairness.

8. The effect of the decree and sale, was to establish a debt, a condemnation of the property of the debtor, and its transfer to the claimant. The plaintiff in execution shows no better evidence of *his* claim. To condemn property held under such proceedings, the burden rests upon the plaintiff in execution to establish fraud in the decree and the sale, and the claimant is not required to establish its integrity. The fact that the defendant to the decree was in possession at the date of the sale and prior to its execution, is not conclusive evidence of fraud in the absence of such proof. [Wadsworth v. Havens, 3 Wend. 411.]

9. Possession of property by the defendant in execution since the sale, is not evidence of fraud, the sale being public and notorious. [Watkins v. Birch, 4 Taunt. 823; Joseph v. Ingraham, 8 Id. 338; Latimer v. Batson, 4 B. & C. 652; Leonard v. Baker, 1 M. & S. 251; Laughlin v. Ferguson, 6 Dana, 118, and cases cited; 4 Porter, 252.]

LESESNE, for defendant in error.

1. The charges of the court to the jury, under the facts in evidence, are correct as to the effect of possession. [Hobbs v. Bibb, 2 Stew. R. 54; Ayres v. Moore, Ib. 336; P. & M. Bank v. Borland, 5 A. R. 531; Borland v. Mayo, 8 Ib. 104; Edwards v. Harbin, 1 D. & E.]

2. Retention of possession after mortgage forfeited, is the same in its effect to create the presumption of fraud, as after an absolute sale. [Edwards v. Harbin, above cited; 1 Smith's Leading Cases, p. 1; Wiswall v. Ticknor & Day, 6 A. R. 178.]

3. The temporary employment of Coxe to superintend the property, had no purgatory effect upon the fraudulent possession. Nor the temporary employment of one of the slaves. [Edwards v. Harbin, above cited.] Joint possession even by the vendee with the vendor is merely colorable. [Wordell v. Smith, 1 Campb. 332.]

4. The court correctly charged the jury, that the consideration must be proven by extrinsic evidence. The transaction had been impeached by evidence creating a presumption of fraud, and even as against a subsequent creditor, it was necessary to remove the badges of fraud by proof of consideration. [2 Leigh R. 29; Goodgame v. Cole & Co. at the present term of this court.]

5. The fact that there had been a foreclosure and sale, did not dispense with the necessity of explanatory proof, or proof of consideration. These proceedings are not evidence against a stranger. [1 Stark. Ev. pt. 2, p. 369, Note 1, and case there cited.]

6. The evidence showed that Roper had been insolvent for many years; this imposed the necessity of showing the consideration. [2 Leigh R. 29, above cited; 5 A. R. 9; 5 Pick. 388.]

7. The *onus* of proving that the debt arose before the mortgage was made was on the claimant, first, because the proof had impeached it as fraudulent. [Cases last cited.] It is incumbent on the party relying upon a title thus impeached, to show the admissions on which he relies. In this case the title itself arose before the debt of the plaintiff in execution.

8. The statute of 1845 (pamphlet acts, p. 136) is conclusive against such evidence. The law is levelled at the statements, not the person of the mortgagor. To admit his statements, while he is in person incompetent to testify, would involve a plain absurdity in the administration of justice.

9. The case at bar is distinguishable from *Goodgame v. Cole & Co.* 1st. In the fact that the admission there was made before any sale took place to the claimant. 2d. In the fact that it is the fraudulent deed which in the case at bar is relied upon as proving its own consideration, in the face of the facts impeaching its *bona fide* character.

10. The cases cited by the plaintiff in error show that the mere fact of a judicial sale does not of itself divest a fraudulent possession of the character affixed to it by law. [*Leonard v. Baker*, 1 M. & S. 251; *Latimer v. Batson*, 4 B. & C. 652, and the case from 4 Taunton are examples.]

ORMOND, J.—The title of the claimants, is a purchase of the slaves in controversy, in March, 1844, upon a sale made upon a decree in chancery, rendered in his favor *v. Roper*. The title of the bank rests upon a levy made upon the same slaves, in November, 1846, upon an execution issued upon a judgment, obtained in September, 1845. It is evident from this statement, that as these parties derive their title from the same source, that of the claimant being prior in point of time, and of the same grade, with that of the plaintiff, is on its face the better title. Nor does this appear to have been directly controverted in the court below. The contest there, appears to have been, upon whom the burthen of proof was cast, to prove the consideration of the respective judgments.

The claimant, it appears, produced the mortgage, which was the foundation of the decree under which he claimed, and the notes recited in the mortgage, and insisted, they were *prima facie* evidence of the truth of the facts recited in them, as an admission of *Roper*, the common debtor of both the parties. The court required him to go further, and prove the fact, that the indebtedness actually existed, and had been discharged by the claimant, as surety, so as to entitle him to foreclose his mortgage.

In the actual posture of the case, this was error in the court below. It does not appear, that when the claimant obtained his decree against Roper, the debt upon which the bank afterwards obtained a judgment against Roper, existed; and assuming that the debt did not exist until afterwards, the decree was evidence, *prima facie*, that the facts upon which it was founded existed. If the bank had shown, that at that time it was a creditor of Roper, the *onus* would then have been shifted to the claimant, who would have been required to show, that his decree was founded upon a debt actually due to him from Roper. This is the principle to be extracted from the case of Goodgame v. Cole & Co., at the present term.

The case of Blow v. Maynard, 2 Leigh, 49, decides nothing adverse to the principle settled in that case. The question there was, as to the effect of a recital in a deed, by one indebted at the time, and by which he conveyed his property to a member of his family, and the court held, that where this deed was set up, against one who represented a party, who was a creditor long anterior to the making of the deed, that the recital in the deed, was not evidence of the consideration there expressed. The admissibility of such testimony, under such circumstances, is not countenanced by the case of Goodgame v. Cole & Co.

It was doubtless also competent for the bank to impeach the decree, under which the claimant deduced his title, for fraud between him and Roper. The principal fact relied on to prove the transaction between Roper, and the claimant collusive, was the retention by Roper of the slaves after the forfeiture of the mortgage; and the exercise of ownership by him, over the property. Upon this point, the court in substance charged the jury, that the retention of possession by the mortgagor, after the law day had passed, was precisely equivalent in its effects, to the vendor remaining in possession, after an absolute sale of personal property. This charge cannot be supported. There is a plain, and obvious distinction between the two cases. The purpose of a mortgage, is the security of a debt, and not the sale of property. Although as a consequence of the mortgage, the property may be sold for the payment of the debt. But that is not the primary in-

tent of the parties, and the design being to secure the payment of a debt, and not to sell the property, there is not the same inconsistency in leaving it with the mortgagor, even after the forfeiture of the mortgage, as in the case of an absolute sale, purporting to transfer both the title and possession. Doubtless the retention of the possession by the mortgagor, for any considerable portion of time, with the assent of the mortgagee, after the forfeiture of the mortgage, would be a circumstance from which fraud might be inferred, if not satisfactorily explained. But where the mortgagee proceeds with reasonable diligence, to foreclose his mortgage, no presumption whatever of fraud arises from the fact, that whilst the proceedings are in progress, the property is suffered to remain with the mortgagor, as that is entirely consistent with the object of the mortgage—the security of the debt. If proceedings are not commenced within a reasonable time to subject the property to the payment of the debt, it then devolves on the mortgagee to show, that his conduct is consistent with fair dealing. The law was thus ruled in *Willis v. The P. & M. Bank*, 5 Ala. 781, where the general language employed by the court, in *Magee v. Carpenter*, 4 Id. 475, is restrained and limited.

The fact, that the mortgagor was suffered to retain the possession after the foreclosure of the mortgage, and sale under the decree, stands upon different principles. The notoriety of a public sale, which by giving notice to the public, that the title has passed out of the former owner, and thereby prevents him from obtaining a delusive credit, from the apparent ownership of property, which belongs to another, creates a distinction, between public and private sales, where there is no change of possession, as to the rights of creditors. [*Kild v. Rawlinson*, 2 B. & P. 59; *Watkins v. Birch*, 4 Taunton, 823; *Joseph v. Ingraham*, 8 Id. 338; *Leonard v. Baker*, 1 M. & S. 251; *Latimer v. Batson*, 4 B. & C. 652; *Bank of Alabama v. McDade*, 4 Porter, 266; *Abney v. Kingsland*, 10 Ala. 363.]

In *Latimer v. Batson*, *supra*, the law is thus summed up, by Mr. Justice Bayley, as the result of the adjudged cases: “That if goods seized under an execution, are *bona fide* sold, and the buyer suffers the debtor to continue in possession of

the goods, still they are protected against subsequent executions, if the circumstances under which he has the possession are known in the neighborhood. The jury in this case, were therefore properly directed to give their verdict for the plaintiff, or defendant, according as they should be of opinion, that the transaction was fair or fraudulent." This is clear, and intelligible, and is doubtless the law upon this subject. In the case then, of a public sale of goods, the purchaser may leave them with the former owner, upon a contract with him, or from mere kindness or benevolence, and if this conduct is *bona fide*, and is not intended to delay, hinder or defraud creditors, he will hold the property against the other creditors of the debtor.

In *Kidd v. Rawlinson*, *supra*, Lord Eldon lays stress upon the fact, that Kidd, the purchaser, was not a creditor. In *Watkins v. Birch*, *supra*, Gibbs, Justice, asserts, that this makes no difference, if the creditor takes a regular bill of sale from the sheriff. In our judgment, the only difference in such a case would be, that the creditor, being also a purchaser at execution sale, would be required to establish the justice of the debt, against one not a party, or privy to the judgment, under which he claimed title.

Reversed and remanded.

BRANCH BANK AT MOBILE v. TILLMAN.

1. An action may be brought on a lost negotiable note, which had not been negotiated at the time of the loss.
2. The statute authorising suits to be brought on lost bonds, notes, &c., and requiring an affidavit to be made of the loss, is cumulative, and was not intended to repeal any remedy which previously existed. It is therefore competent to prove by other competent testimony, the loss of an instru-

ment on which suit is brought, be the effect of the affidavit, when made under the statute, what it may.

Writ of Error to the County Court of Sumter.

THIS was an action of assumpsit, at the suit of the plaintiff in error, on two promissory notes, payable and negotiable at the Branch of the Bank of the State of Alabama at Mobile, which the declaration alleges to be lost, but still due and unpaid. A bill of exceptions was sealed at the instance of the plaintiff, from which it appears that the court refused to admit any secondary evidence of the notes, because an affidavit, such as the statute requires, was not made of their loss. Whereupon the plaintiff took a non-suit, and excepted to the ruling of the court.

M. F. HOIT, for the plaintiff in error, cited Clay's Dig. 326, § 76; 381, § 6; 382, § 9; 2 Root's Rep. 126, 144; 3 Stewt. Rep. 31; 3 Cow. Rep. 303; 10 Johns. Rep. 104; 1 Ves. Sen'r Rep. 341; 16 Ves. Jr. Rep. 430; 2 Greenl. Ev. § 156.

A. R. GATES, for the defendant in error, cited Clay's Dig. 381, § 6; 382, § 9; 3 Stewt. Rep. 31; 6 Porter's Rep. 166; 2 Greenl. Ev. § 156.

COLLIER, C. J.—Mr. Greenleaf, in the section which the counsel have cited, says, if a bill or other negotiable security be lost, there can be no remedy upon it at law, unless it was in such a state when lost, that no person but the plaintiff could have acquired a right to sue thereon. Otherwise the defendant would be in danger of paying it twice, in case it has been negotiated. Therefore, wherever the danger of a double liability exists, as in the case of a bill or note, either actually negotiated in blank, or payable to bearer, and lost or stolen, the claim of the indorsee or former holder has been rejected. But if there is no danger that the defendant will ever be liable on the bill or note, as if it be proved to have been actually destroyed, while in the plaintiff's own hands,

or if the indorsement was specially restricted to the plaintiff only, or if the instrument was not indorsed, or has been given up by mistake, the plaintiff has been permitted to recover upon the usual secondary evidence. See also the citations in the notes by the author on the same page. In *Chaudron v. Hunt & Norris*, 2 Stew. & P. R. 31, it was held to be sufficient for the declaration to alledge that the note on which the recovery was sought, was lost, and still unpaid, without averring that it was not indorsed when it was lost, or whether it was lost before or after its maturity.

It is however insisted, that the law in respect to the remedy upon lost notes, has been so modified by the act of 1828, "regulating judicial proceedings," as to require an affidavit to be made of the loss, as a pre-requisite to the institution of the suit. [Clay's Dig. 382, § 9.] The section relied on, and the preamble of the act are as follows: "Whereas, there hath been much uncertainty in the decisions of the courts of this State, respecting the manner in which persons may bring suit upon any bond, bill, note, or other instrument in writing, which may be the foundation of such suit, and which bond, bill, note or other instrument may have been lost; for remedy whereof: *Be it enacted, &c.* That when any person may have, or own, or may have had or owned, any bond, bill, note, agreement, or other instrument in writing, the right or title to the same remaining in him, her or them, and the same shall be, or shall have been, destroyed by fire, or lost by accident, such person or persons shall be authorized, upon first making oath in writing of the loss of such bond, bill, note, agreement, or other instrument, and that the same has not been paid, satisfied or discharged, to sue at common law, for and recover upon the same, upon making proof of the contents of such bond," &c. &c. The preamble of this enactment indicates its true meaning, too clearly to be misapprehended, viz: to provide a certain remedy *at law*, for parties who have lost the written evidence of any debt or duty—the necessity for which is affirmed to be the uncertainty in the decisions of the courts of this State upon the subject. In this view it must be regarded as furnishing a cumulative remedy, and not as repealing or annulling all others which

were previously recognized *at law*. It employs no negative or exclusive terms, either expressly or by implication, and according to established principles of construction, effects nothing else than to furnish an additional remedy—while it leaves all others that are consistent with it, in full force.

Whether, if the notes in controversy purported on their face to have been given in consideration of the purchase of part of a sixteenth section, (as it is said they did,) it would have been competent for the plaintiff to have passed the legal interest in them by an indorsement, we need not inquire. It is not pretended that they were *negotiated*, and the mere fact of their being negotiable, does not affect their right to maintain the action.

Whatever may be the effect of the affidavit when made as the statute directs, we cannot doubt but it is altogether competent to prove by other evidence, at the trial, the loss of an instrument on which suit is brought. It therefore follows, that the judgment of the county court is reversed, and the cause remanded.

DICKSON, JR. v. BRIGGS.

1. The condition of a bond reciting that the title to a lot of land is in dispute, and stipulating that the obligor shall satisfy that dispute, and keep the obligee, his heirs, &c. in possession forever, and pay him all such damages as he may sustain by the pretended claim set up to the lot, is to be construed as a covenant to satisfy the outstanding incumbrance, or remove the outstanding title, as the case may be, within a reasonable time; and if not so done by the obligor within a reasonable time, the obligee may pay the incumbrance, or remove the outstanding title, and have his action on the bond for indemnity.
2. Where the disputed title covenanted to be satisfied, consists in the claim

Dickson, Jr. v. Briggs.

of a former vendor, for notes given by a former purchaser, to whom no deed was executed, these notes constitute a lien, which the obligee may remove on the default of the obligor, and recover the sum paid, by action on the covenant.

Writ of Error to the County Court of Franklin.

COVENANT by Briggs, against Dickson, on a bond, the condition of which recites that Dickson had sold and conveyed to Briggs two lots of land in Russellville, Nos. 188 and 189, for the sum of \$200, on which is situated a two story brick building, and for which Dickson had executed to Briggs a deed in fee simple—"the title to one of said lots is in dispute"—and then provides: "Now if the said Dickson shall satisfy that dispute, and keep the said Briggs, his heirs, &c. in possession forever, and shall pay said Briggs all such damages as he may sustain by the pretended claim set up to said lot," then, &c. The breach assigned is, that the defendant has not satisfied that dispute, by means whereof the said plaintiff, before suit brought, was forced and obliged, and did necessarily lay out and expend large sums, &c. in and about satisfying the dispute to the title to one of said lots. The defendant demurred, but his demurrer being overruled, he then pleaded *non infregit conventionem*, on which issue was joined.

At the trial, the plaintiff, after putting in evidence the bond and the deed recited or referred to in the condition, showed that the defendant purchased the lots sold him from one Michael Dickson—that Michael Dickson purchased the lot from the county of Franklin—that no deed was executed by the commissioners' court to Michael Dickson—that Michael Dickson gave his notes for the purchase money and took possession—two of these notes for \$85 remaining unpaid, it was agreed between the county commissioners and the plaintiff, that these notes should be delivered to the latter upon his paying \$100, and this being done, they transferred to him all liens on the said lots, created by the giving of these notes. He also proved that these notes had never been paid by Mi-

chael Dickson, and that the defendant was advised by the plaintiff before he took them up.

The defendant then proved that Michael Dickson was solvent, and had some years before removed to Mississippi, where he resided at the time of the trial.

On this state of proof, the court charged the jury, that if any part of the purchase money was due from Michael Dickson for the lot purchased by the plaintiff of the defendant, then this was such a legal incumbrance on the lot as the plaintiff was authorized to discharge, and its payment would entitle him to his action on the bond.

The defendant requested the court to charge, that the circumstances in proof did not warrant a recovery. This being refused, the defendant excepted.

He now assigns the overruling of the demurrer, and the rulings at the trial as matters of error.

NoOE, for the plaintiff in error, insisted—

1. Under the covenant, no action will lie until eviction, and the plaintiff was not authorized to purchase in the outstanding equitable incumbrance. [7 Ala. Rep. 487; 9 Ibid. 179.]

2. The proof does not show that any one disputed the plaintiff's title or possession.

COOPER, contra, contended—

1. The bond is in legal effect a covenant to remove incumbrances, and the defendant being advised of that existing here, was bound to remove it. [9 Ala. Rep. 179; 2 Lomax on Real P. 273.]

GOLDTHWAITE, J.—1. The questions raised by the demurrer, and by the proof at the trial, are slightly different, yet sufficiently similar to enable us to consider them together. The demurrer in effect denies there is any cause of action until the plaintiff has been disturbed or evicted from the possession; and the request for the particular charge insists the plaintiff's payment of the debt due from the former purchaser is not to be answered by the damages in this suit. If the legal effect of the covenant in this case, is one for quiet enjoy-

ment only, it is quite probable there would be no breach without some disturbance of the possession, and it may be the declaration should then contain averments of something equivalent to eviction. [Platt on Cov. 320; 2 Lomax Dig. 269; Caldwell v. Kirkpatrick, 6 Ala. Rep. 60; Banks v. Whitehead, 7 Ib. 83.] It seems to us, however, that when the defendant stipulates he will satisfy the dispute respecting the title which the bond admits to exist, this must receive the same construction as a covenant to remove incumbrances, or a covenant that the estate is free from incumbrances. It will be seen the other covenants extend fully to quiet enjoyment, and for indemnity in case of eviction. The only object, then, for inserting the stipulation to satisfy the dispute, must have been to bind the party to remove the dispute from the title. It is well settled, that a covenant that premises are free from incumbrances, is broken immediately on the execution of the deed, if there are any such then on the land, and that the grantor need not wait to be evicted, but may extinguish them and call on the grantor for indemnity. [Prescott v. Truman, 4 Mass. 627; Delavergne v. Norris, 7 Johns. 358; Duval v. Craig, 2 Wheat. 45.] There is no reason why a less beneficial construction should be given to a contract to remove an incumbrance. Certainly the purchaser ought not to be prejudiced by the vendors allowing it to remain for an unreasonable length of time. In our judgment, such a stipulation as is found here requires the covenantor to remove it within a reasonable time, and upon his default to do so, the purchaser may himself remove the cause of dispute, and require indemnity from the covenantor by suit on the bond.

2. The evidence shows the defendant derived his title to the lot by deed from one who purchased from the commissioners of Franklin county, but to whom no conveyance was executed on behalf of the county, and that two of the notes given by this individual for the purchase money, were unpaid and outstanding. The effect of this is, that the legal title remained with the county, and could have been exerted against the obligee, at least to the extent of enforcing a lien upon the lot for the unpaid purchase money. If, instead of enforcing the title of the county to the lot, the commission-

ers were willing to relinquish it on the payment of the outstanding notes, we think it clear, from the analogies to which allusion has been made, the plaintiff was authorized, upon the defendant's default, to make the necessary payment, and resort to his action on the bond. The measure of damages under such circumstances, is the amount reasonably expended in effecting the removal of the incumbrance.

Under these views, we consider the declaration is sufficient, as it assigns the breach in the terms of the covenant; and that the rulings of the court at the trial are free from error.

Judgment affirmed.

AIKIN v. BLOODGOOD.

1. An action for the breach of a contract under seal, must be brought upon the instrument itself, unless the contract has been subsequently varied by the parties.
2. The addition of other work to a building, without any departure from the original plan, does not change the original contract entered into. If no price was agreed on for such additional work a *quantum meruit* would lie for the work so added.
3. The failure to finish the work by the time stipulated, is not a rescission of the contract. If accepted by the other party the objection is waived.
4. When a workman undertakes to do work, to be paid for in the notes of third persons, he cannot abandon the contract, and treat it as a money demand, unless the contract has been rescinded, or he has been prevented by the act of the opposite party, from performing it according to its terms.

Error to the Circuit Court of Mobile.

ASSUMPSIT by the defendant in error. The declaration contains the common counts, to which the defendant pleaded the general issue.

Upon the trial, it appeared that the plaintiff had built a

cotton warehouse, yard, wall, &c. for the defendant, furnished the materials, &c., and that the work, and materials were worth \$3200.

The defendant then produced a notice, on the plaintiff to produce a written contract, which was produced and read to the jury. By this contract, which was under seal, and dated 3 July, 1844, after describing particularly the work which is to be done, it concludes, "and any thing else done, which may be necessary, if not specified, to make the whole correspond with Aikin's warehouse, on Water street before mentioned. Neville is to furnish all materials, and to finish the whole work, by, or before the 1st October, in a workmanlike manner. The stipulated price of the work to be paid by Aikin, is two thousand dollars, of which one thousand dollars was paid in the month of May last, for the remaining one thousand dollars, said Aikin is to give Neville, the note of F. A. Lacy, and R. H. Nash, indorsed by himself as follows : One note for \$333, due 1st February, 1845 ; one for \$333, due 1st March, 1845 ; and one for \$334, due 1st April, 1845."

In witness whereof, &c. Signed and sealed by both parties.

The defendant objected to any evidence by witnesses, of any agreement for the doing of the work, other than the contract in writing—and also, objected to any evidence of the value of the work provided for by the contract in writing, differing from the price specified therein. The court overruled the objections, the plaintiff not having offered or relied on the written contract, and the defendant excepted.

The plaintiff then examined witnesses to prove, that the work was properly done, and completed, as the contract required ; and that extra work was done to the value of ninety dollars.

The defendant proved, read and relied on the written contract, and examined witnesses to prove that the work was not done until December, instead of October—that a part was improperly done, and he had caused it to be rebuilt by others, at a cost of \$123 50. Also, that on the 21st Octo-

ber, 1844, the plaintiff gave an order for the two last mentioned notes in the contract, which were accordingly delivered, and that the plaintiff had acknowledged himself indebted to him, for \$188 for negro hire, from July to 1st November, 1844. There was no evidence of any demand made of the note first mentioned in the written contract, or refusal to deliver it.

The defendant asked the court to charge, that the plaintiff could not recover for any work embraced in the written contract, but could only recover for extra work, he might prove he had done and had not been paid for.

That for any work specified in the contract, and done under it, the plaintiff could not recover for the non-delivery of the note first mentioned in the contract, without a demand and refusal.

These the court refused to give, but instructed the jury, that the plaintiff not having pleaded the contract in bar, and not having made a tender of the note, the plaintiff could recover in this action, any amount proved to be due for extra work, and also the balance due for the work proved, not to exceed the sum specified in the contract. To which the defendant excepted, and now assigns for error.

STEWART, for plaintiff in error, cited *Snedicor v. Leachman*, 10 Ala. 330.

DARGAN, contra, cited 4 Cowen, 564; 5 Gill & J. 240; 9 Pick. 298; 4 Wendell, 285; 15 Id. 87.

ORMOND, J.—Where parties by a contract under seal, stipulated for the performance of any duty, an action for its breach must be brought upon the instrument itself, and *assumpsit* will not lie, unless the contract has been subsequently varied by the parties, by the introduction of new terms into the contract, or providing a different time for its performance. [*McVoy v. Wheeler*, 6 Porter, 201.]

We do not understand from the facts, as recited in the bill of exceptions, that there was any change of the terms of the written contract entered into between these parties. It appears that *extra* work was done, and that it was not complet-

ed until December, instead of October, as provided by the contract. The fact that *extra* work was done, not called for in the contract, is entirely consistent with the contract remaining in force. We do not understand from this, that there was any departure from the original plan, but that other, additional work was added. This it is clear would not change the contract, which would still remain in force, and for such additional work, if no price was agreed on, a *quantum meruit* would lie. Nor could the omission of the builder, to complete the work by the time he had stipulated, work a change or rescission of the contract. If, notwithstanding the work was not completed in time, it was accepted by the other party, the only effect would be, that he would be held to have waived any objection to it on this score. But to entitle the plaintiff to abandon the contract, and recover as on a *quantum meruit*, he must show, either that the contract has been rescinded, or that he has been prevented by the act of the opposite party from performing it on his part, according to its terms. [Liningdale v. Livingston, 10 Johns. 36.]

It also appears, that in this case, the plaintiff was not to be compensated in money, but in certain notes, which are described. It is quite too clear for argument, that the plaintiff cannot, without fault of the defendant, abandon the contract, and convert it into a money demand. Whether, if the contract was rescinded by the act of the defendant, or by the agreement of the parties, the plaintiff might not recover upon a *quantum meruit*, without a demand of the note, we need not consider, as there is nothing in the record from which we could infer a rescission, or abandonment of the contract; and whilst it subsists it cannot be converted into a money demand, without a refusal on the part of the defendant to deliver the note. [Snedicor v. Leachman, 10 Ala. 332.]

It was not necessary that the defendant should plead the existence of the special contract, he could take advantage of it under the plea of *non-assumpsit*. Judgment reversed and cause remanded.

COUCH v. TERRY'S ADM'RS.

1. A surety, who has been compelled to pay the debt of the principal, may recover at law of a co-surety, not only his proportion of the debt, but under the act of 1839, may also recover his proportion of the part of any other co-sureties shown to be insolvent. But notwithstanding this statute, chancery has concurrent jurisdiction.
2. If the party elects his remedy in chancery, it is not necessary to make the principal debtor, or an insolvent co-surety a party.

Writ of Error to the Court of Chancery sitting in Lawrence county.

The complainant alleges, that on the 15th of April, 1839, Thomas J. Couch as principal, and himself and William L. Couch, and David Terry, as sureties, executed their writing obligatory, by which they obliged themselves to pay to the administrators of the estate of Daniel Johnson, deceased, the sum of \$1137 58, one day after date. On this writing a judgment was recovered by the obligees, in the county court, on the 19th January, 1841, against all the obligors, (saving the principal, who was not served with process,) for the sum of \$1137 57, debt, \$160 58 damages, and \$21 37, costs of suit. Of this judgment the sum of \$985 88, was collected by the sale of the defendant's property, on the first Monday in June, 1841; and the same is now satisfied in full.

T. J. Couch, the principal, and W. L. Couch, the surety, were insolvent, and have so continued ever since the rendition of the judgment. David Terry has died since the judgment was recovered, and Drury Stovall and Samuel M. McCaughey have taken letters testamentary on his estate.

The bill prays that Terry's executors be made defendants thereto, that they answer the same, and an account be taken of the amount of money paid by complainant as a co-surety of the testator, and the interest which has thereon accrued, and that one half the sum thus ascertained, be adjudged to

him from the testator's estate. And that such other relief be granted as may be appropriate to the case.

The defendants demurred to the bill, and assigned for cause that the complainant had an adequate remedy at law, and that Thos. J. and Wm. L. Couch, should have been made parties to the suit. The Chancellor sustained the demurrer, and dismissed the bill without prejudice, at the complainant's costs.

T. M. PETERS and J. B. SALE, for the plaintiff in error. A resort to equity was necessary to enable the complainant to recover of the defendants the additional charge upon their testator's estate, in consequence of the insolvency of one of the co-sureties. The act of 1839, (Clay's Dig. 533, § 12,) does not modify the law in this respect, except where the suit is by motion pending an action against the surety who makes the motion. [1 Story's Eq. 470, *et seq.* §§ 492, 496 to 500; 5 Ves. Rep. 592.] The remedy at law is at least doubtful, and equity may be resorted to. [1 Stewt. & P. Rep. 135.]

The act of 1839 merely furnishes a cumulative remedy, leaving the party his election to proceed in equity, if he think proper. The principal, and one of the sureties being insolvent, they need not have been made parties. [Calvert on Parties, ch 1, § 1, *et seq.*; Story's Eq. Pl. §§ 76, 77, 159, 161, 169; 2 Stew, R. 280; 3 Id. 233; 1 Stew. & P. R. 317; 2 Id. 361; 4 Id. 447; 5 Id. 133; 2 Porter's R. 351; 4 Id. 65; 2 Ala. R. 264; 6 Id. 304.]

COLLIER, C. J.—The act of 1839, "for the relief of sureties in certain cases," provides, that when a suit may be pending against a surety, he may give notice to any co-surety not sued, and recover a judgment against him for his proportion of the debt: "*Provided however*, that if any of said co-sureties are insolvent, the surety thus sued as aforesaid, may, on said motion to be made as above, recover a judgment against said co-surety, or sureties, thus to be notified, the proportion which such co-surety or sureties should pay, if such insolvent co-surety, or sureties, were not bound for said debt, or demand." [Clay's Dig. 533, § 12.] In Sher-

rod v. Rhodes, 5 Ala. Rep. 683, it is said, "At common law, one surety who was compelled to pay the debt, could only recover from another surety an *aliquot* part, or that sum which is produced by a division of the debt actually paid by the number of the sureties, without regard to their solvency. But the rule in a court of chancery is, to divide the loss equally among the solvent sureties. This equitable rule has been made the rule at law by a statute of this State." The enactment to which the court had reference is that from which we have quoted above.

The right of one surety to sue a co-surety is consequent upon the payment of the debt for which they were both bound; and the remedy by action in the usual form is not impaired by the legislature having prescribed a summary remedy by notice and motion. [Roberts v. Adams, 6 Porter's Rep. 361.]

In Young v. Clark, 2 Ala. R. 264, it was decided, with reference to the act of 1839, that where there are five sureties to a note, three only of whom are solvent, and the holder of the paper sues one who is solvent with one who is insolvent, the solvent surety may move against the other solvent sureties, and recover of each one third of the sum for which judgment is rendered against him: *Further*, the statute applies as well to contracts then in existence as to those made in future: *Also*, that the motion may be made either at the term when judgment is rendered in favor of the holder of the security, or at any subsequent term; that he is as much entitled to, and more in need of relief when he has actually paid the debt secured, than when only in danger of being compelled to do so.

Thus we see, that independently of the statute, one surety may sue his co-surety in the ordinary form of action, after he has paid the debt for which they were both liable, though he could only recover of him an amount proportioned to the number of sureties, without reference to their solvency. That to entitle him to recover for the proportion of the insolvent sureties, he was bound to institute a suit in equity. It was this inconvenience which it is said in Sherrod v. Rhodes is remedied by the statute cited, that authorizes a court of law to administer the same justice that was previously ob-

tainable. We are aware that what is there said, can hardly be considered as a point adjudicated, yet the previous decision of *Young v. Clark* shows, that the act shall not receive a literal construction, where it would defeat the intention of the legislature; and that the remedy by motion will lie after the surety who has been sued, has satisfied the judgment against him. It certainly does not require greater liberality of interpretation than was indulged in the case last cited, to sustain the decision in fifth Alabama Reports; and if the one comes within the equity of the statute, of which we have no doubt, we think it may be assumed that the other does also. We cannot perceive of a single reason which would require the application of a different rule of damages where the proceeding is by motion, than if an action of *assumpsit* were prosecuted. This view may suffice to show, that the complainant had a remedy at law, in which, for any thing appearing to the contrary, he could have obtained all the justice he seeks.

It is certainly a rule of very general application, that where a party has an adequate remedy at law, he shall not be allowed to seek redress in equity. The right to sue in chancery, for contribution, was an established head of chancery jurisdiction in the time of Queen Elizabeth, on the plain principles of natural justice: so that if one of several sureties paid the whole, or more than his proportion of the debt, he might compel his co-sureties to pay not only his *aliquot* part, or if the original debtor, or one of the sureties became insolvent, each of the solvent sureties, was made to contribute to the obligation thus thrown upon him. Ultimately, courts of law entertained actions between sureties, but the court of chancery did not on this account renounce its jurisdiction. This tribunal still exercises a concurrent jurisdiction in all cases for contribution between sureties, and there may be cases in this State, where, notwithstanding our liberal legislation, it is alone competent to afford a perfect remedy. [1 Story's Eq. 475; 1 Spence's Eq. Jur. 661 to 664; *Wright v. Hunter*, 5 Ves. Rep. 792; *Sheppard v. Monroe, et al.* 2 N. Car. L. Rep. 624; *Owens v. Collinson*, 3 G. & Johns. Rep. 25, 40; *Mitchell's Adm'rs v. Sproel*, 5 J. J. Marsh. Rep. 270.] These citations are so direct to that point, the it is needless

to add to them, or to amplify this opinion by the employment of further argument. We then conclude, that although the complainant had a remedy at law, he might, if he elected, have sued in equity.

In respect to the second objection to the bill, we are satisfied it was not well taken. It could not have been necessary to make the principal debtor, or the insolvent co-surety a party. No relief was sought as against either of them. True, it was necessary, to entitle the complainant to the full measure of what he sought to recover by his bill, that he should have proved the insolvency of the co-surety, as alledged, and it may be, of the principal also. [McCormack, Adm'r, v. Obannon, 3 Munf. Rep. 484.] But as no consequences prejudicial to them would result from proof of that fact—as the decree could not foreclose to any extent their rights, and the defendants, as the representatives of the deceased surety, would not be prejudiced by making, or omitting to bring them in as parties, the frame of the bill, in this respect, is not obnoxious to a demurrer. Our conclusion then is, that the chancellor erred in dismissing the bill ; his decree is therefore reversed, and the cause remanded.

ADAMS v. GARRETT, ET AL.

1. Where a condition is annexed to a bill of sale, it is not competent to show by parol evidence, that another and different condition was agreed to by the parties.

Writ of Error to the Circuit Court of Cherokee.

DETINUE by Adams, against William and Mary Garrett, to recover a certain slave.

At the trial, the plaintiff proved the possession and property in the slave to have been in him previous to February, 1841, and that since that time, it had been in the possession of the defendants, as well as the value of the slave, and that his yearly services were worth \$100. The defendants then gave in evidence a bill of sale, executed by the plaintiff, with two other persons, to William Garrett for the said slave, dated 12th June, 1841. To this bill of sale is a condition, that if either of the grantors should pay the said Garrett \$380, (the price mentioned in the preceding part of the instrument as paid to them,) at any time thereafter, then the said Garrett should return the said slave to them, or either of them, or pay the sum of \$1200 if he failed to do so.

This is executed by the grantors, but is not executed by Garrett.

The plaintiff then offered to prove this bill of sale was executed to secure the defendants in a contract for the loan of \$380, on which the plaintiff was to pay twenty per cent. per annum, and the defendants were to pay \$100 per year hire for the slave; also that in 1843, the plaintiff had tendered the defendants \$115. The defendants objected to this proof as varying the written contract, and on this ground the court excluded it.

The plaintiff excepted, and now assigns this ruling as error.

LEWIS E. PARSONS, for plaintiff in error, insisted—

1. The written instrument offered in evidence, is a mortgage on its face; but even if it were an absolute conveyance, it could be shown by parol that it was intended to operate as such. [Hudson v. Isbell, 5 S. & P. 67; Derhozo v. Louis, Ib. 91; see also Kennedy v. Kennedy, and cases cited; English v. Lane, 1 P. 328.]

2. If this were an absolute conveyance on its face, and a bill were filed charging the facts here relied on, would not a chancellor direct an account to be taken of the value of the services of the boy, and after allowing the mortgagee legal interest, require of the mortgagor only such balance as might appear to be due?

3. If the parties have themselves stipulated the value of

the negro's services, proof of this fact cannot be said to vary the written agreement, because that is silent upon this head. Where no consideration is expressed, it is admissible to prove what it was. [5 S. & P. 410; Brown v. Isbell, 11 Ala. R. 1010, and cases cited; see also Murchie v. Cook & McNab, 1 Ala. R. 41.]

4. This evidence is certainly admissible to show that there was a fraud in omitting to insert the whole agreement. [Pysant v. Ware, et al. 1 Ala. 161; Beard v. White, Ib. 436.] This is proper at *law*. But the court rejected it as incompetent for any purpose, because it tended to vary the written instrument. *Fraud is a question of fact, and the evidence should have gone to the jury, that they might determine it.*

A. J. WALKER, for the defendants in error, contended—

1. The amount to be tendered cannot be diminished by a counter claim against the party to whom the tender is made, or in other words, the requisite amount must be tendered in *money*, and not a part in money and a part in a counter claim. [2 Phil. Ev. 133, 134; Brady v. Jones, 16 English Com. Law R. 87; Dewey v. Bellows, 9 N. H. 282; Cary v. Bancroft, 14 Pickering, 315.]

2. The written contract is a conveyance to Wm. H. Garrett, with a right to plaintiff to demand a restoration of the negro upon payment of \$318. The contemporaneous agreement that Garrett should pay \$100 per annum hire, and that plaintiff should pay 20 per cent. per annum interest on the \$318, is in conflict with the written contract of the parties, and is an attempt to vary a written instrument by a verbal arrangement made at the time of its execution, or to change its legal effect. [Holt v. Moore, 5 A. R. 521; Standifer v. White, 9 A. R. 527; Hair, et al. v. La Brouse, 10 A. R. 550; Paysant v. Ware & Barringer, et al. 1 A. R. 160.]

GOLDTHWAITE, J.—It is not material now to inquire whether the condition attached to the bill of sale makes the transaction a mortgage, because it seems to us the same answer must be given to the question raised on the record, whether it is so considered or regarded as a conditional sale, with the reservation of the right to restitution, upon the re-

turn of the purchase money. Conceding the title to the slave would be revested by the tender of the specified sum, according to what is said in *Sewall v. Henry*, 9 Ala. Rep. 24, it by no means follows that such is the effect when the debt is equitably discharged by the reasonable hire of the slave. We do not understand, however, that this view was pressed at the trial, but then the plaintiff insisted on the right to show that the real contract was, that a specific hire should be allowed for, until the debt was extinguished or the money returned. If this does not fall within the rule prohibiting the modification of written contracts by parol evidence, it seems to us quite difficult to suppose a case for its operation. There is no pretence to say that it is the affixing a condition to an absolute conveyance, because the written instrument already has a condition, and if another can be added by parol, there must be an end of all certainty. In conformity with this view of the law, it has been held, where a mortgage was conditioned for the payment of money, parol evidence is inadmissible, that it was given to indemnify the mortgagee as special bail for the mortgagor, and that no damage had been sustained. [*Jackson v. Jackson*, 5 Cowen, 173.] So, where the mortgage was conditioned for the payment of \$50, parol evidence was not allowed to show it was intended to indemnify the mortgagee for becoming surety for a note of \$25. [12 Wend. 61. To a similar effect is *Brooks v. Maltbie*, 4 S. & P. 96.] These citations (and many others we doubt not might be added) are quite sufficient to show that parol evidence was inadmissible to show a different condition from that recited in the bill of sale. It is unnecessary to consider how far a fraudulent imposition of a condition in the bill of sale, from that intended by the parties, would affect the instrument in a suit at law, as the proof had no tendency to raise that question.

Judgment affirmed.

EMANUEL v. MARTIN.

1. When partners execute several notes, in their individual names, for work done for the firm, if there is a total failure of the consideration, the defence may be made by either, when sued upon the note executed by him.

Error to the County Court of Conecuh.

THE defendant in error, brought suit against the plaintiff in error, before a justice of the peace, and recovered judgment, from which the defendant appealed to the county court. Upon the trial in that court, as appears from a bill of exceptions, it was proved, that the notes which were the foundation of the action, were given for work and labor performed by the plaintiff, for Farnham & Emanuel, as manager and chief workman in tanning, currying, and dressing leather, in the tan-yard of Farnham & Emanuel. That after his services were closed with the firm, each member executed their notes separately, for one half the wages due by the firm to the plaintiff, and that when the partners come to examine their hides, and leather, they found that plaintiff had neglected to attend to his business, and that the hides and leather were damaged to a greater extent than the amount of the notes, the foundation of the action.

The defendant moved the court to charge, that if the jury found these facts to be proved, the notes were without consideration, to the extent of the injury caused by the conduct of the plaintiff. This charge the court refused to give, but charged, there could be no failure of consideration to a note given by one member of a firm, on account of damage done by the plaintiff in failing to perform duties he had agreed to perform for the firm. To which the defendant excepted, and which he now assigns as error.

BRODIE, for plaintiff in error.

T. D. CLARKE, contra.

ORMOND, J.—The bill of exceptions in this case, is obscurely drawn. As we understand it, it presents the case of two partners executing their individual notes to a workman, for a debt due from the partnership, and that the work which was the consideration of the notes, was so unskilfully and badly executed, that the entire consideration of both notes has failed. This is doubtless a defence, which either partner may make, when sued upon the note executed by him, as the failure of consideration is entire, as to both contracts, and the right to make the defence is not lost by the execution of separate notes.

Judgment reversed and cause remanded.

ROWDON v. YOUNG, ADM'R.

1. A copy of a promissory note, evidencing a debt due from an insolvent estate, verified by affidavit, is a sufficient compliance with the statute requiring claims to be filed, and it is competent after objection made, to produce the original.

Writ of Error to the Orphans' Court of Shelby.

ON the 27th December, 1845, the report of insolvency which the defendants had previously made of their intestate's estate, was confirmed, and the appropriate order made with a view to the settlement of the same. On the 2d September, 1846, the administrators filed objections in writing to the allowance of the plaintiff's claim, which state the following causes: 1. Because the claim filed is only the copy of a

note, or bond, and the absence of the original is not accounted for. 2. Because the note or bond on file was not made by the intestate, or any one for him. 3. Because the plaintiff's claim, if he have one, was not filed within six months after the estate was declared insolvent, verified by affidavit. 4. Because the claim was not presented to the administrators, or either of them, within eighteen months after the grant of administration. An issue was made up, and the parties agreeing to dispense with a jury, submitted the questions arising to the court, whereupon it was adjudged that the objections be sustained, the claim forever barred, and that the plaintiff pay the costs.

A bill of exceptions was sealed at the instance of the plaintiff, from which it appears that he filed in the office of the clerk of the orphans' court, an account and affidavit, as follows, viz: "Talladega, Feb. 1, 1846. Fenelon Young, Dr. To one note of hand, or promissory note, to wit: \$1,000. One day after date, I promise to pay John P. Rowdon, the sum of one thousand dollars, for value received, as witness my hand and seal, this 8th day of April, 1844. Fenelon Young, L.S. State of Alabama, Shelby county. Before me, Elijah G. Lawley, clerk of the county court of Shelby county, came John P. Rowdon, who, after being duly sworn according to law, saith, on oath, that the above is just and unpaid. Sworn to this day, 23 Feb. 1846. E. G. Lawley, clerk. (Signed,) John P. Rowdon." It was admitted that this paper was filed within six months from the time the estate was reported insolvent.

On the trial of the exceptions, the plaintiff produced the original note, of which the foregoing was a copy. Upon this evidence the court was of opinion that the claim was not sustained, and thereupon rejected the same, and adjudged the plaintiff to pay the costs; to which he excepted.

L. E. PNRSONS, for the plaintiff in error, made the following points: 1. The evidence of the claim need not be shown, nor its justice established at the time it is filed. [3 Ala. Rep. 283.] The object of the objections being to ap-

prize the creditor of the insufficiency of his claims, he may remove them by completing the evidence before the claim is acted on. [Clay's Dig. 194, § 10; Hollinger v. Holly, 8 Ala. Rep. 454; Brown v. Easley, 10 Ala. Rep. 565; Shortridge v. Easley, Id. 520.]

2. The evidence necessary to sustain a claim, is often distinct from, and independent of, the claim itself. Here the note is but evidence of it. [Moore v. Spence, 6 Ala. Rep. 508.]

COLLIER, C. J.—The ninth section of the act of 1843, "to amend the laws now in force in relation to insolvent estates," requires every person having a claim against the estate of a deceased person, which is reported insolvent, to file the same in the clerk's office of the proper orphans' court within six months after the report is confirmed; every such claim shall be verified by the affidavit of the claimant; and the clerk shall indorse thereon the day on which it was filed, and shall keep a docket, or list of such claims, which shall at all times be subject to the inspection of the administrator and creditors of the estate; and if no opposition be made to the allowance of the claim, as provided by the act, within nine months after the estate was declared insolvent, it shall be allowed as a valid charge against the estate, without proof. The tenth section enacts, that within nine months after the estate is declared insolvent, the administrator, or any creditor thereof, in his name, may file objections in writing, to the allowance of any claim; and thereupon the court shall cause an issue to be made up between the claimant as plaintiff, and the administrator, or the contesting creditor in his name, as defendant, by pleading thereon as if the claimant had sued the administrator at law. If the issue shall be found against the claimant, his claim shall be rejected, and he shall pay all costs of the issue and trial; but if the issue shall be found in favor of the claimant, for the whole amount of his claim, the same shall be adjudged to be allowed, and he shall recover his costs, &c. If part of the claim shall be found due, his claim shall be adjudged to be allowed to that amount, and the court in its discretion, may direct the costs to be paid, &c. The act then proceeds to direct, that within

not less than nine, and not more than twelve months from the confirmation of the report of insolvency, the court shall proceed to make a final settlement, and adjudge to the creditors their rateable proportions, &c. [Clay's Dig. 194, §§ 10, 11, 12.]

In Hollinger, et al. v. Holly, et al., 8 Ala. Rep. 454, it was said, that the statute, in requiring all claims to be filed in the clerk's office within six months after the estate is declared to be insolvent, is imperative, and operates so as to entirely bar and exclude from participation in the assets, all creditors who omit to do so. But it was held, the direction that each claim shall be verified by the affidavit of the claimant, does not seem to be of such a nature as to warrant the rejection of a claim for its omission, when no exception is taken in the mode pointed out by the statute. The administrator, or a creditor, may require the claim thus to be verified; but if no such exception is taken, the want of an affidavit will not authorize its rejection; and it may be made after objections are filed to the claim. [Shortridge v. Easley, 1 Ala. R. 520; Brown & Co. v. Easley, Id. 564.]

In the case at bar, the only question is, whether the filing of an exact copy of a note, or other writing, evidencing a claim against the estate, verified by affidavit, is a sufficient compliance with the statute, and is it competent after objection made, to produce the original? It may be questioned whether the creditor is bound to file all the evidence by which he expects to establish his claim; if he should not, we incline to think, if he has specified his claim with so much particularity that it cannot be misapprehended, he ought to be allowed to sustain it, by the legitimate proof of its validity. The statute does not, *in totidem verbis*, require the evidence by which the validity of the demand is made apparent, to be filed, but merely the claim itself. It is perfectly certain, that the note or bill single is not the debt, but merely furnishes proof of it, and that the destruction of the evidence would not extinguish the liability to pay. [The Branch Bank at Mobile v. Tillman, et al., at this term; Moore v. Spence, 6 Ala. Rep. 506; Lee's Adm'r's v. Fontaine and Freeman, 10 Id. 755.] We have seen that the affidavit which the act requires, may be made after an objec-

tion is taken for the want of it, and why should not other proof of the claim be admitted in the same manner? The copy of the bill single, with the affidavit, is quite as explicit as the most formal declaration; and where an action is instituted in the ordinary mode, the plaintiff need not file the evidence of his demand until called for by the defendant, or it is required to entitle him to a verdict or judgment. Why should not the same indulgence be tolerated in a proceeding such as that now before us? *Besides*, does not the statute, in directing pleadings to be made up, and an issue tried, contemplate the introduction of other proof by either party, where it is necessary, than the claim as filed? Without stopping to answer these questions, we are of opinion that the plaintiff's claim should not have been rejected, because the bill single was not filed simultaneously with the copy and affidavit, and that it was competent for him to produce the original at the trial of the issue. The judgment of the orphans' court is consequently reversed, and the issue remanded to be tried again.

DEL BARCO v. BRANCH BANK AT MOBILE.

1. Irregularities in a delivery bond given by the claimant of property levied on, cannot be examined in the first instance in this court. If the bond is so defective as not to warrant the plaintiff in suing out execution, the proper course is to apply to the circuit court, or to a circuit judge to supercede it.
2. Where upon the record, it appears the issue is joined with one who is not a party, this will be rejected, if the judgment entry shows the trial of an issue between the proper parties.

Writ of Error to the Circuit Court of Mobile.

CLAIM interposed by Del Barco to certain property levied

on by a *fi. fa.* at the suit of the bank, against Wm. A. Hardaway. The issue found in the transcript, is the allegation by the bank that the property was subject to the levy, to which "the claimant, R. A. Hardaway, for plea says that the property is not subject to the execution."

The judgment entry is entitled The Branch Bank of the State of Alabama at Mobile v. Wm. A. Hardaway, defendant in execution, and Joseph E. Del Barco, claimant, and recites the coming of the parties by their attorneys, the empanelling of a jury to try the issue between the said plaintiff and the said claimant, the return of a verdict finding the property subject to the execution, and assessing its value, and a regular judgment upon the verdict.

The bond given by Del Barco, is also in the transcript, from which it appears the execution is recited as one against W. A. Hardaway, and Myers and Scott are the sureties.

The writ of error is sued out in the names of Del Barco, Myers and Scott, who here assign as error—

1. That no proper issue was joined between Del Barco and the plaintiff in execution.

2. That the bond set forth in the transcript is void, there being no such execution as there recited.

3. That there were no sufficient proceedings had to cause the forfeiture of the bond.

4. The verdict and judgment are insufficient, and do not sustain the liability of the appellants.

5. The bond is not authorized by the statute to be taken, nor returned forfeited.

Afterwards, the plaintiff in error moved to amend the writ of error, by striking out the names of Myers and Scott, if necessary to make the writ conform to the record.

STEWART, for the plaintiff in error.

LESESNE, contra.

GOLDTHWAITE, J.—1. Most of the assignments of error refer to supposed irregularities in the bond given by the claimant for the redelivery of the goods seized, in the event of their condemnation, but these cannot be examined in the first instance in this court. If the bond does not conform to

the statute, or is otherwise so irregular that under the statute the plaintiff would have no authority to sue execution upon it, the proper course would be to supercede the execution by application to the court below, or to a judge of the circuit court in vacation.

2. Upon the record, as between the plaintiff in execution and the claimant, all is regular, if the joinder of issue (which in the transcript is stated as being made by the claimant, R. A. Hardaway) is kept out of view. This cannot in any manner control the effect of the judgment entry, which after stating the title of the cause, as one in which W. A. Hardaway is defendant in execution, and Del Barco claimant, proceeds to set out that upon the issue joined between the plaintiff and the said claimant, a verdict was returned and judgment entered. It is impossible to presume this entry was made in a suit between the plaintiff and R. A. Hardaway. The constant course of practice in this court, is to reject all matters which are inconsistent with the judgment entry, or to consider them as clerical misprisions, which amend themselves, by reference to other parts of the record. This inconsistent joinder of issue, upon the plaintiff's allegation that the property levied on was subject to the execution, in our judgment must be rejected, and then the record is free from error.

Judgment affirmed.

NORTH v. ESLAVA.

1. The act of 30th January, 1840, for the collection of rents in the city of Mobile, does not differ from the general attachment law, as it, in effect merely authorizes a suit to be commenced by attachment, for the recovery of rent in the city of Mobile, and is to be governed by the same rule as other suits commenced by attachment.
2. Upon an agreement under seal for the payment of \$324, in monthly in-

instalments of \$27, covenant will lie for any of the instalments, as they fall due; but a declaration which counts for a part of a month not due, and also for the residue of the unexpired term, is bad on demurrer. Whether debt would lie before all the instalments are due—*quere*.

Error to the Circuit Court of Mobile.

THIS was a proceeding to recover rent, by the defendant in error, under a local statute, peculiar to the city of Mobile.

The affidavit which is the foundation of the proceeding, was made by G. M. Mallet, setting forth, that the plaintiff in error was indebted to the defendant in error, in the sum of \$163, for the rent of a tenement on Royal street, within the corporate limits of Mobile. A bond was executed by Eslava, payable to North, with surety, reciting that he had prayed for a warrant of distress, and with condition to pay all such costs and damages, as he might recover for the wrongful or vexatious suing out of the distress. The justice of the peace thereupon issued a distress warrant, which was levied on certain articles of personal property, which were replevied by the defendant, who entered into bond, with condition to have them forthcoming to abide the judgment. The plaintiff counted upon a lease under seal, and the defendant failing to appear and plead, a judgment by default was rendered against him, and the damages assessed by a jury to \$252 51, for which judgment was rendered.

The defendant now assigns for error—

1. The insufficiency of the affidavit.
2. The irregularity and insufficiency of the warrant.
3. The insufficiency of the declaration.
4. That the verdict and judgment are erroneous.
5. That the replevy bond does not conform to the statute.
6. That the defendant had no notice, and was not in default.

G. N. STEWART, for plaintiff in error.

JARNAGIN, contra.

ORMOND, J.—In *Dumes v. McCloskey*, 5 Ala. 239, we considered the effect of a statute precisely similar, in all respects to this, except that in the former act, passed in January, 1834, a levy was authorized to be made on any goods, found within the tenement, whilst in this, passed 30th January, 1840, the levy is confined to the goods of the defendant. Both these acts are local, applying only to the city of Mobile, and authorize an attachment to be levied on the goods of the tenant, found on the leased premises, for the payment of rent in arrear.

In the case previously referred to, we held that this was a proceeding *in rem*, and that the judgment was not general against the defendant, but operated only on the property attached. This point was not necessary to be decided in that case, as it went off upon the ground, that the suit was improperly brought against the representative of the tenant, and further reflection has satisfied us, the view then taken of the statute was incorrect.

We do not perceive any reason why suits commenced under this statute, should differ from those brought in virtue of the general attachment law. The manifest design of this statute was, to give the landlord a *lien* upon the goods of his tenant, found in the tenement, when levied upon, unless replevied, and requires him to substantiate his right to sell the goods attached, or to have execution upon the replevy bond, by obtaining a judgment against the tenant. It is then, in effect, merely a suit commenced by attachment, for the recovery of rent in arrear, and in this aspect, we will now consider the errors assigned.

We do not perceive any defect in the affidavit, warrant, or bond, but we may dismiss the inquiry by merely adverting to the decisions of this court, that such objections must be made in the court below, by plea in abatement, and cannot be made in this court on error. [*Jones v. Pope*, 6 Ala. 154, and cases there cited.]

We have seen, that this is a suit commenced by attachment, for the recovery of rent in arrear, it follows that upon return of the process, it was necessary the plaintiff should allege his cause of action. This has been done in this case,

by declaring upon the covenant entered into for the payment of the rent. It is objected, the party should have declared in debt, but if debt would have lain in this case, it is clear covenant could also be maintained. The agreement as set forth in the declaration, is for the payment of the sum of \$324, in monthly instalments of \$27. It may perhaps be well doubted, whether debt would lie, until the expiration of the year, but there can be no doubt covenant could be maintained. [Dean and Chapter of Windsor v. Gover, 2 Saunders, 303.]

The declaration also proceeds to alledge, that ten months, and eleven days of the rent, was due and in arrear, at the time of the commencement of the suit, amounting to the sum of \$163, and that the further sum of \$81 is due upon the covenant. It was proper, as we have seen, to declare in covenant, for any of the instalments due at the time of the commencement of the suit, but the plaintiff could not count upon a part of a month, as the rent was not due until the expiration of the month. It is equally clear, he could not demand the residue of the unexpired term of the rent, in this action, as it was not due at the commencement of the suit, and if objection had been taken to the declaration for this cause, by a demurrer, it should have been sustained. It is also available on error. Our statutes of *jeofails*, only cures defects of form, unless after verdict, when a material issue has been tried. [Turner v. Brown, 9 Ala. R. 866; Kent v. Long, 8 Id. 46.] This judgment was by default, and therefore not aided by the statutes, being matter of substance, and not form merely.

Judgment reversed, and cause remanded.

JONES & CO. v. JONES.

1. Upon a suit by one, on a note due to him from a partnership, a debt from him, to one member of the firm, may be set off against the demand due from the firm. *Quere*, where one of several defendants, sets off a demand due to him alone, can he have judgment for any balance in his favor?

Writ of Error to the County Court of Russell.

THIS was an action of assumpsit on a promissory note, by which the plaintiffs, on the first of January, 1845, acknowledged to be due to the defendant in error the sum of \$158 75. The cause was submitted to the jury upon the pleas of *non assumpsit*, *payment* and *set-off*, a verdict was returned for the plaintiff below, and judgment was rendered thereon. The members of the partnership were J. H. Jones, J. H. Williams and W. Ambrose. From a bill of exceptions, sealed at the instance of the defendants, it appears that the defendant Jones, proved that the plaintiff was indebted to him individually in the sum of \$160. The defendants prayed the court to charge the jury, that this debt was a proper subject of set-off in this suit. This charge was refused, and the jury were instructed, that the debt due one of the defendants by the plaintiff was not mutual, that is, the other defendants had no interest in it; and consequently was not an available defence.

N. COOK and T. H. WATTS, for the plaintiff in error, cited Clay's Dig. 323, § 63; 338, § 161; Minor's Rep. 321; 1 Ala. Rep. 93; 7 Ala. Rep. 837; 9 Id. 226. The case of Von Pheel & McGill v. Connally, et al. 9 Porter's Rep. 452, will appear, from the slightest examination, to be unlike the present.

J. E. BELSER, for the defendant in error, cited 5 Ala. Rep. 110.

COLLIER, C. J.—In *Carson & Moore v. Barnes*, 1 Ala. Rep. N. S. 93, it was said to be no objection that a note offered to be set off was payable to *one* of several defendants in the action. “The defendants are liable jointly and severally to satisfy the plaintiff’s demand, and a debt due from him to either, would be a good set-off against it.” To the same effect is *Pitcher & Remsen v. Patrick’s Adm’r*, Minor’s R. 321. See also *Clark v. McElroy*, 1 Stew. R. 147; *Gee, Adm’r, v. Nicholson*, 2 Stew. Rep. 512. And such was held to be the law in *Winston v. Metcalfe*, 6 Ala. Rep. 756. In that case W. & P. were the joint makers of a promissory note payable to J. W, who assigned it to M, the plaintiff; previous to notice of the assignment, P, one of the makers, acquired by indorsement a note made by J. W. payable to J. P. The suit was by M. against W. alone. It was held that W. was entitled to the benefit of the set-off of which his co-maker, P, was the proprietor, against J. W.—on producing it at the trial with the consent of P. thus to use it. See also *Mitchell v. Burt*, 9 Ala. Rep. 226.

Taylor v. Bass, 5 Ala. Rep. 110, is unlike the present case, and belongs to a different class. There the action was brought against one of several partners upon his individual liability, and the defendant attempted to set off a debt due the partnership. The court said this was not allowable; if it were, “the partnership assets would be diverted and appropriated to the payment of one partner’s individual debts, and thereby the creditors of the joint concern, as well as the other partner, would be involved with the payment of debts with which they had no concern, and for which the other partner is in no manner liable.”

Whether, where one of several defendants sets off a demand due to him alone, he can have judgment against the plaintiff for any balance in his favor, is no test of the admissibility of the set-off, and is a question which need not now be considered. [1 Stew. & P. Rep. 19.] The error in the ruling of the county court is apparent from what has been said—its judgment is consequently reversed, and the cause remanded.

PERRY v. GRAVES.

1. The declarations of the payee of a note, through whom the plaintiff derives title as indorsee, are not evidence to charge the maker, although his admissions made on a previous day in discharge of the maker, had been given in evidence by the latter—the later admissions not being made in the same conversation as those first spoken of.

Error to the Circuit Court of Pike.

ASSUMPSIT by Graves, as the indorsee of a note payable to one Eaves, against Perry, as its maker. The note is dated 30th December, 1844, payable 1st January, 1846.

At the trial, the defendant having been allowed against the plaintiff's objections, to prove the declarations of Eaves, the payee, in August, 1845, that the note sued on was given for the hire of a servant, which he took from the defendant's possession, before the time of hiring expired, and then had the servant in his own possession. The plaintiff proved he traded for the note before it was due—that the defendant, the day before the note came to plaintiff's possession, told one Lassiter the note was good, and he had no objection to Lassiter's trading for it—and then offered to prove declarations of Eaves, the payee, made in October, 1845, that he and the defendant had a settlement, in which the defendant was satisfied for Eaves' taking the slave from him before the expiration of the hiring.

The defendant objected to these declarations, but the court allowed them as evidence.

The defendant excepted, and now assigns the same as error.

BURFORD, for plaintiff in error.

No counsel appeared for the defendants in error.

GOLDTHWAITE, J.—It appears the declarations of Eaves, the payee of the note sued on, made on two several

occasions, were admitted by the court as evidence. They were first offered by the defendant to show, either a total or partial failure of consideration in the note; and afterwards by the plaintiff, to show that the matters out of which this supposed failure arose, had been settled between him and the defendant, and satisfaction rendered the latter. It may be, that the defendant himself was improperly allowed to give these admissions in evidence, without other proof that Eaves, at the time of making them, was the holder of the note—a fact which, if made to appear, is not stated in the exceptions—but allowing the court had such evidence, it did not warrant the declarations as against the defendant, who could not be charged in this manner. It may be, the declarations made subsequently, were offered with a view to explain and do away the force of those previously made; but even in this view, they were entirely inadmissible, as they were not parts of the same conversation, and as he would be directly interested to sustain the right of the plaintiff; and also, on the ground that these declarations were mere hearsay.

Judgment reversed and cause remanded.

JORDAN v. MEAD.

1. Executions issued by justices of the peace, from one county to another, may be certified, either by the clerk of the county to which it is sent, or by any justice of that county, who is satisfied of the genuineness of the signature of the justice issuing it.
2. A purchaser of a slave at a constable's sale, who has notice of an unregistered mortgage on the slave, may nevertheless protect himself, if the plaintiff in the execution had no notice of the mortgage, until after his *lien* attached, by the levy of his execution.
3. A mistake made by the clerk, in the date of the probate of a deed, cannot prejudice the party, or prevent him from proving the true date of the probate.

Error to the Chancery Court of Madison.

THE bill was filed by the defendant in error, to foreclose two mortgages. The first of these, was executed as alledged, on the 17th December, 1839, to secure the complainant as surety in a debt due the bank at Huntsville, standing in the name of one David Daniel as principal, and Kennon Harris (the mortgagor) and the complainant as his sureties, for one thousand dollars, payable in three instalments, the first of which fell due in December, 1838, and was paid; the two remaining instalments being still due. This debt, it is alledged, was the proper debt of Harris, and Daniel and the complainant, sureties, and to secure him against liability, the mortgage was executed, conveying two slaves, Jim and Critty, which was acknowledged by him, on the day of its date, before a justice of the peace, and duly recorded.

That on the 1st March, 1840, Harris executed another deed of mortgage upon the same slaves, to secure a debt due the bank, of the same amount as the preceding, in which Harris was principal, and one Lewis and complainant sureties; acknowledged on the 21st August, 1840, before a justice of the peace, and on the 11th September, 1840, filed in office for record, and duly recorded. That on, or about the 15th August, 1840, the plaintiff in error became possessed of the negro woman Critty, by a pretended purchase, but with full knowledge of the mortgages above described. That Harris is wholly insolvent, and complainant will have the debt to pay, &c. The prayer of the bill is for an injunction, foreclosure, &c.

The mortgages are made exhibits to the bill, and correspond with the allegations, except that the certificate of the magistrate of the acknowledgment of Harris of the mortgage first described, is dated 17th December, 1838.

The defendant, by his answer, denies all knowledge of the execution of the mortgages, and denies that they were duly proved, and recorded; and alleges that the last mortgage was not made on the day of its date, but on the 1st of March preceding, and was antedated to defraud the creditors of Harris; but admits he was notified of them previous to his purchase.

He derives his title to the slave Critty, by a purchase at an execution sale, upon two judgments obtained by one Connally against Harris, before a justice of the peace in Madison county, upon which executions issued on the 29th July, 1840, and were sent to a constable of Jackson county, by whom they were levied on the slave Critty, and being returned and renewed, he sold the slave in virtue thereof to the plaintiff in error, on the 1st October, 1840.

That the bank having obtained judgment against Harris, and his sureties on the last instalment of both debts described in the mortgages, complainant acquired the control of both from the bank, and caused an execution issued on the judgment, rendered on the debt described in the last mortgage, to be sent to the county of Jackson, and levied on a tract of land belonging to Harris, which was sold for \$405, and which he insists should have gone in discharge of the other judgment, obtained on the debt described in the first mortgage. He further charges, that by the direction of Mead, the sheriff sold the slave Jim described in the mortgages, under execution issued on the judgment last mentioned, for the sum of \$140.

For the testimony taken, see the opinion of the court.

The chancellor, by his decree, declared the last mortgage fraudulent and void, but that the first was valid, and a *lien* on the slave Critty, and referred it to the master to state an account.

Upon the account being stated, the defendant excepted, because the master refused to charge the proceeds of the sale of the land, upon the debt secured by the first mortgage. But the court overruled the exception, and decreed a sale and foreclosure.

These matters are now assigned as error.

ROBINSON, for plaintiff in error.

CLAY & CLAY, contra.

ORMOND, J.—Before proceeding to consider the merits of the case, it is proper to examine an objection raised by the defendant in error, that the executions under which the defendant below deduced his title, conferred no authority upon

the constable to sell, because they were not certified by a justice of the peace for Jackson county, having been issued by a justice of the peace of Madison county.

The act of 1822 (Clay's Dig. 207, § 32) provides, that where a defendant against whom a justice has rendered a judgment, removes to another county, the justice may issue an execution against his property in such county, "which execution shall be certified by the clerk," and be executed, and returned by any officer of that county.

In 1824, another act was passed on this subject, (Clay's Dig. 207, § 35), that, "in all cases of executions running from one county to another, it shall be the duty of any justice of the peace of the county to which such executions may be directed, upon having the same presented for that purpose, and upon being satisfied of the hand-writing of the justice of the peace issuing such execution, to certify the same, which shall be sufficient evidence of the authenticity thereof." We cannot think it was the design of the legislature, by the passage of this last act, to repeal the former. It was evidently intended to provide another mode for the accomplishment of the same object, the authentication of the paper as a genuine writ, and such being the case, it follows, that either mode will be sufficient, and having been certified by the clerk of Madison county, the constable was authorized to act upon them as genuine writs.

The certificate of the justice of the peace, before whom the acknowledgment of the execution of the mortgage was made, is dated 17th December, 1838, whilst the mortgage itself bears date the 17th December, 1839; and from the certificate of the clerk of the county court, it appears it was delivered for registration on the 23d March, 1840. The date of this certificate, being prior to that of the deed, the execution of which it purports to establish, is manifestly impossible, and if not open to explanation, by proof of the true date, must be inoperative. In the case of a deed, the date is a mere formal part, being only *prima facie* evidence of the time of delivery, and may be contradicted or explained. [2 Stewt. & Porter, 65.] The date of a certificate such as this, can certainly have no greater sanctity than that of a deed. It could not be tolerated, that the mistake of an officer in dating his cer-

tificate, should prejudice the rights of the parties. We are clear in the opinion, the mistake could be explained by parol proof, so as to show when the certificate was in fact made, which is fully established by the proof. It was not necessary to let in this proof, that there should have been an averment that there was a mistake in the date of the certificate. The allegation that it was acknowledged on a particular day, is sufficient, and it was not necessary to state the evidence by which the allegation was to be proved.

It is satisfactorily established by the testimony, that Jordan had notice of the mortgage of the complainant before he purchased the slave in controversy, and examined it on the record of the county court. But as it does not appear, that Connally the creditor had notice of the unregistered mortgage, before his *lien* attached, by a levy of his executions upon the slave by the constable, the purchaser at the constable's sale, may protect himself under the *lien* of the creditor. If this effect is not ascribed to the creditor's *lien*, it is illusory; whether a notice to the creditor, would have prevented the *lien* from attaching, if given previous to the levy of the executions, we need not now stop to inquire.

This point was expressly ruled in *Daniel v. Sorrelles*, 9 Ala. 447, as it respects real estate, and the principle is entirely applicable to personal property. In that case, the *lien* was held to attach, upon the rendition of the judgment, as that gives a *lien* upon the real estate of the defendant. The same effect must flow from the acquisition of a *lien* upon personal property, in virtue of the delivery of an execution to the sheriff from a court of record, or an actual levy of an execution from a justice's court by a constable. In both cases the *lien* is absolute against the defendant in execution, and must be good against one holding under him, by a title of which the creditor had neither actual, or constructive notice, before his *lien* attached.

This point is decisive of the whole case, as it shows that the complainant has no right to foreclose his mortgage, against the slave so purchased, and renders it wholly unnecessary to consider the other points made in the argument.

The result is, that the decree must be reversed, and a decree be here rendered dismissing the bill.

SCARBOROUGH v. REYNOLDS.

1. The agency of a party must first be proved by other evidence than his acts, before it can be assumed that his acts are binding on the principal.
2. A special authority conferred upon an agent, in the management of a plantation, and the interests connected with it, to demand and sue for all monies, &c., "subjecting myself to be sued through him, in the same manner as if I was personally present," does not give the agent power to execute a note in the name of the principal.
3. Such a power does not authorize a submission of matters in dispute to arbitration, at least until after suit brought.
4. An authority to an agent, stated thus, "if you can honorably and fairly settle with Reynolds for me, out of court, do so, if not, let the court and jury settle," does not authorize a reference to arbitrators; nor will authority to exercise a reasonable discretion, or to submit to a reasonable sacrifice, confer such power.
5. Where a witness states, that according to his best recollection, written evidence of an award exists, it is sufficient in the absence of opposing proof, to exclude parol testimony of the award.
6. A witness cannot be allowed to state, that he saw a credit of \$400 entered upon a note, without producing the note, unless, perhaps, the note has been fully paid off, so as to warrant the inference that it has been destroyed, or unless he could swear to the payment from his own knowledge.

Writ of Error to the Circuit Court of Macon.

THE defendant in error declared against the plaintiff, in *assumpsit*, on a promissory note, dated the 12th October, 1844, and payable one day after date, for the sum of \$516 39. The cause was tried on issues to the following pleas, viz:—

1. *Non-assumpsit*. 2. That James Allen, who purports upon the face of the note to have made the same, as the defendant's agent, acted without the defendant's knowledge, authority or consent. 3. The plaintiff is indebted to defendant in a sum which exceeds the amount of the note, and for the excess the defendant prays judgment against the plaintiff according to the statute. Upon the trial, the defendant excepted to the ruling of the court. To sustain the

authority of Allen to make the note declared on, the plaintiff adduced a letter of attorney, made by the defendant, on the 7th February, 1844, which recited that the latter, who was a citizen of Montgomery county, in the State of North Carolina, was the proprietor of a plantation, slaves, and stock, in the county of Macon, Alabama, to which it was inconvenient for him to attend in person; and confiding in the integrity of James Allen, of Russell county, Alabama, he had appointed him his sole agent, with authority to do and transact in the name of the principal, "all business necessary for a judicious management of all my plantation interest in the county of Macon, and State of Alabama aforesaid, hereby authorizing him to contract in my name for such working tools, work horses, or other stock, or provisions, as may be required on said plantation, to sell and dispose of such surplus provisions and stock as the said Allen should think may be dispensed with, to employ and discharge such under agent or overseer as he may choose, never more than one at a time; to sue, ask for and demand all sums or monies due me, or which may become due in the hands of Newman Reynolds, and all other persons whatsoever, all forfeitures, and damages or penalties to me in anywise belonging or accruing, subjecting myself to be sued through him, in the same manner as if I was personally present, and I do hereby bind myself, my heirs and assigns to stand to and abide by all the transactions of the said Allen," &c.

Plaintiff next read extracts from some four or five letters, written by the defendant to his agent; the first of which is dated in February, 1844, and the last in August of the same year, from which we condense the following: "Inclosed you will find a power of attorney, written after the form you sent me, duly authenticated, also Newman Reynolds' receipt, accompanied by a kind of scrawl account, from which I am in hopes you can get a tolerably correct outline of the situation in which I left my business with Mr. Reynolds."

Again: "You observe in your letter that Reynolds thinks to be ready for a settlement by the spring. He wrote last summer that all the money was collected, then why not be ready before spring?" "If you can possibly, honorably and fairly settle with Reynolds for me, out of court, do so, if not,

let the court and jury settle." On 30th April, 1844, he writes thus, "I would suggest (with deference, however,) that may-be it would be prudent, whenever you and him attempt to settle, let it be in the presence of some few gentlemen of undoubted veracity." *Again*, on the 16th May following he says, "In my letter of the 30th April last, I advised you how to settle with Mr. Reynolds, still should you think it undoubted the best to settle with him in some other way, I have no objection to your exercising a prudent discretion in the matter. I have every reason to believe he intends to wrong me." *Further*, "Please do the best you can with the matter—write to me as soon as this comes to hand—give me all the information you can." *Lastly*: "As I always have said to you, I still say, settle with him if you possibly can, by exercising a prudent discretion, even at a reasonable sacrifice on my part; if not, be certain to bring him into court at your next term."

It was proved by Allen, the agent, that the plaintiff resided in Russell county, Alabama; that witness had been the agent of the defendant in this State for three years prior to the year 1844, and had never seen defendant in this State during the period of his agency. Thereupon the defendant moved to exclude the note from the jury, but his motion was overruled.

On the part of the plaintiff it was further shown, that the greater part of the consideration of the note was a disputed *item* in a running cash account between himself and the defendant; and for the purpose of concluding the defendant from all inquiry into the correctness of that item, proved that it had been made the subject matter of arbitration by an agreement between the plaintiff and Allen, acting as the defendant's agent, under the authority conferred by the power of attorney, and extracts of letters above stated, and the arbitrators had decided the dispute in favor of the plaintiff. The admissibility of this evidence was objected to, on the ground that Allen was not authorized to submit the matter to arbitration, but the objection was overruled, and the testimony permitted to go to the jury.

The defendant then introduced a witness, who testified that himself and some three or four others were the referees

in the arbitration, and though not positively certain of the fact, yet according to his best recollection, the award was reduced to writing; but if written, he did not remember to whom it was delivered. Thereupon the defendant moved the court to exclude all the testimony in respect to the award, but his motion was overruled.

It was further proved, that the plaintiff, while acting as the defendant's agent, received a large amount of money belonging to his principal. Thereupon the plaintiff proved the disbursement of certain sums of the money so received by him; and for the purpose of showing that he had paid out an additional sum of four hundred dollars for the benefit of the defendant, proved by the agent, Allen, that on a partial settlement between plaintiff and witness, the plaintiff insisted that he had paid four hundred dollars on a note given by the defendant to one Flewellen, on which the plaintiff was the surety, and said that a credit therefor was indorsed on the note. Plaintiff then executed a conditional obligation to witness, as the defendant's agent, that if such credit was not on the note, he would pay that amount; which obligation was given up by Allen to the plaintiff before suit was brought. The note to Flewellen was not produced, and the plaintiff, in continuation of his proof on this point, introduced one McRae, who testified that he was defendant's agent subsequently to Allen, and in that character paid money to Flewellen, and at that time he saw a credit on the note for \$400, in Flewellen's hand-writing. The defendant objected to this evidence because the note was not produced, but the objection was overruled, and the testimony permitted to go to the jury. To the several rulings of the court adverse to the defendant, he excepted. A verdict was returned for the plaintiff, and judgment rendered accordingly.

R. DOUGHERTY and N. W. COCKE, for the plaintiff in error, made the following points: 1. A person dealing with one who professes to act in the character of an agent, is bound to know the extent of his authority. [Fisher & Johnson v. Campbell, 9 Porter, 210; Story on Ag. 85, § 72.] 2. Neither the power of attorney nor letters from Scarborough to Allen, authorized the latter to execute the note. [Wood v.

McCain, 7 Ala. 800; Rossiter v. Rossiter, 8 Wend. 494; Story on Agency, § 62 to 66, inclusive.] And it was the duty of the court to have determined the effect of these writings. [Earbee v. Craig, 1 Ala. R. 607.]

3. The power of attorney and letters did not, either separately or collectively, confer on Allen the authority to submit any matter connected with the business of his principal to arbitration. A suit at law, on the failure of the agent himself to effect a settlement, is expressly enjoined. The submission to arbitration was nothing more nor less than a delegation of the agent's authority—to authorize this, the power should have been expressly conferred. [Story on Ag. 14, § 13.]

4. The evidence was *prima facie* sufficient to show that the award was reduced to writing; and in the absence of all counter proof, or an attempt to account for its non-production, the parol testimony should have been excluded. [3 Phil Ev. C. & H's Notes, 1210; Broone v. Dykes, 3 Monroe Rep. 529; Mather v. Goddard, 7 Conn. Rep. 304; Clark v. Longworth, 1 Wright's R. 189; McKee v. Reif, 4 Yeates' Rep. 340.]

5. To have authorized the admission of evidence of the payment to Flewellen, the note should have been produced, or its absence accounted for.

J. E. BELSER, for the defendant in error, insisted, that the authority of the agent, Allen, was general and unlimited in respect to the management of defendant's business of planting in Macon county, or the mode of settling his accounts with the plaintiff. [21 Wend. Rep. 279; 13 Mass. R. 178; 1 Pick. Rep. 215; 22 Id. 85; 6 Cow. Rep. 354; 1 Wash. Rep. 454.] Upon the facts disclosed, the assent of the defendant to the manner in which his agent had exercised his authority may be presumed. [14 Serg. & R. Rep. 27; 3 Cow. Rep. 281; 7 Id. 739.]

The agent had the power to submit to arbitration, and the note is but the award of the arbitrators, and in legal effect the act of the defendant. This is shown by the power of attorney and letters. The note was nothing more than the

consummation of a settlement regularly made, and is binding on the defendant.

COLLIER, C. J.—1. It is not necessary to advert to the well settled distinction between a general and special agency, as to the obligation of third persons who may deal with an agent, to know the extent of his powers, and how and to what extent they have been limited. [Gaines v. McKinley, 1 Ala. Rep. N. S. 446 ; Webster v. Seekamp, 4 B. & A. Rep. 352 ; Fenn v. Harrison, 3 T. Rep. 760 ; Whitebread v. Tuckett, 15 East's Rep. 407 ; Gibson v. Colt, 7 Johns. Rep. 390 ; Wood v. McCain, 7 Ala. Rep. 800 ; Munn v. Commission Co. 15 Johns. Rep. 44 ; Parks v. Turnpike, 4 J. J. Marsh. Rep. 456 ; Huntington v. Wilder, 6 Verm. Rep. 334 ; Hayden v. Middlesex Turnpike, 10 Mass. Rep. 397 ; 2 Kent's Com. 618, 620 ; Stackpole v. Arnold, 11 Mass. Rep. 29.] In the case before us, there is no evidence that the authority indicated by the writing adduced, was in any manner limited. The first question then, which arises, is, did these confer the power on the defendant's agent to make the note declared on? In making the note, the fact of agency is assumed, and it was incumbent upon the plaintiff to know the extent and nature of the authority under which Allen acted, and the defendant cannot be charged beyond what it expressly, or by implication imports. [Story on Ag. § 72.]

Bowers of attorney, it is said, are ordinarily subjected to a strict construction, and the authority is never extended beyond that, which is given in terms, or is necessary and proper for carrying the authority so given into full effect. Consequently, it has been held, that a power to sell, assign and transfer stock, will not include a power to pledge it for the agent's own debt. Nor will a power to bargain and sell land, include authority to grant a license to the purchaser previous to a conveyance, to enter and cut timber upon the land, though done *bona fide*, with a view to effect the sale. [Story on Ag. § 68 to 71, and citations in the notes.]

General language, when used in connection with a particular subject matter, will be presumed to be used in subordination to that matter, and construed and limited accordingly.

Under the influence of this rule, it has been decided, that an authority to demand and receive all money that might become due to the principal on any account whatsoever, to "transact all business," and on payment to give proper receipts and discharges, and in the event of non-payment, to use all lawful means for the recovery, did not authorize the agent to indorse a bill received under the letter of attorney, in the name of the principal, and procure a discount thereof, the words "all business," must be construed to be limited to all business necessary for the receipt of the money. So a general letter of attorney to receive from the commissioners of the navy, &c., all salary, wages, &c., and all other money due to the principal, with a general power to receive all demands from all other persons, to appoint substitutes, and to make due acquittances and discharges, has been held not to authorize the agent to negotiate any bills received in payment, or to indorse them in his own name, although there was evidence of a usage among agents of the like sort, to negotiate such bills; for the authority conferred, did not include any any such power of negotiation; and parol evidence is not admissible to control or enlarge the language of a written instrument. It has been also held, that a power of attorney to receive, demand and sue for, all sums of money then due, or thereafter to become due to the principal, in certain countries, and to discharge and compound the same, to execute deeds of land, then or thereafter owned by the principal, in a particular State; and to accomplish at his discretion a complete adjustment of all the concerns of the principal in the State of New York, and to do any and every act in his name which he could do in person, does not authorize the agent to give a promissory note in the name of the principal, upon the ground, that making an adjustment of his concerns, did not include any incidental authority to give the note; for the authority, notwithstanding the general words, was to be construed to be limited to the business referred to in the preceding clauses, and not to include a general authority to adjust all the other concerns of the principal. Story on Ag. § 62 to 68, and citations in notes. See also, *Wallace v. The Branch Bank at Mobile*, 1 Ala. Rep. N. S. 565; *Wood v. McCain*, 7 Id. 800; *Emerson v. The Providence Man. Co.* 12 Mass. R.

237 ; White v. Westport Man. Co. 1 Pick. Rep. 215 ; Brewster v. Hobart, 15 Id. 302 ; Atwood v. Mannings, 1 Mann. & Ryl. Rep. 66.] We might add to these citations many others to the same effect, but this is deemed unnecessary, as the most of them will be found referred to in the two cases cited from our own reports. See however, Paley on Ag. 189, *et seq.* and citations in notes.

The special authority conferred upon Allen related to the plantation of the principal, and the interests connected with it, and authorized him to demand and sue for all monies that might be due to the principal from the plaintiff, and from all persons whatsoever, subjecting the principal to suit through the agent. The general terms employed, and the declaration that the principal would abide by all the transactions of the agent, must be construed in reference to the object of the power, the purpose intended, and the special authority granted. Thus limited, as we have seen the rule of construction requires, it is perfectly clear, the letter of attorney does not impart the power to execute a note in the name of the principal.

What has been said in respect to the power of attorney, is pertinent to the extracts from the defendants letters. These merely authorized the agent to settle with the plaintiff, with or without a suit, or in such manner, even at a reasonable sacrifice, as he should think proper—observing a prudent discretion. This, in effect, was nothing more than an authority to adjust the accounts between the parties, and to receive of the plaintiff what might be due to the defendant. The authorities cited, very satisfactorily establish, that although the balance might be in favor of the plaintiff, the agent could not, in virtue of the power to settle, make a note for its payment, in the name of the principal.

The agency of a party must first be proved from other evidence than his acts, before it can be assumed that his acts are binding on the principal. [Scott v. Crane, 1 Conn. Rep. 255 ; Harrison v. Jackson, 7 T. Rep. 209 ; Rex v. Brigg, 3 P. Wms. Rep. 432 ; Porthouse v. Parker, 1 Camp. Rep. 82 ; Emerson v. Prov. Man. Co., *supra*.] We have seen that the evidence of the agent's authority to bind the defendant, was altogether insufficient, and whether admissible or not,

the court should thus have charged the jury, as to its legal effect.

2. Watson, in his treatise on the Law of Arbitration and Award, (p. 49, *et seq.*) says—"An attorney, in an action at law, has a general power to refer, and by entering into a reference will bind his client; and the courts of law have gone so far in holding a party in a cause bound by the reference of his attorney, that he is even bound by a reference of the action entered into by his attorney, when he has expressly desired his attorney not to refer. So an agent duly authorized, may bind his principal in a submission to arbitration, but the agent must be duly authorized; but in exercising the power given to him by his principal, the agent should make the submission in the name of his principal, otherwise the agent will be bound and not the principal." In Billing's Law of Awards, (p. 53,) it is said, "The power of the attorney seems to be confined to the referring the cause (at the trial) at *nisi prius* only, on the principle, it is presumed, that it is the attorney whom the court recognizes in governing the proceedings, and that the client is bound by the act of the attorney. In any other stage of the proceeding, the attorney would be the mere agent of the principal, and all things which would be deemed necessary to give an agent authority, would be required to authorize an attorney to refer." Both of these authors admit, that it has been decided that a solicitor in chancery has not the same power to refer as an attorney has at law, and intimate that the distinction is well founded. [Inhab. of Buckland v. Inhab. of Conway, 16 Mass. 396.]

We have made these quotations, that it may be seen under what circumstances an attorney at law may assent to the reference of a suit in which his client is a party, and that neither himself nor an agent can submit a controversy of the party represented by them, unless they have an authority, express or implied. The attorney at law, even though employed by an agent, it is said, represents the principal, and if he enters into a reference at the trial in the primary court, without fraud, an award in other respects unobjectionable, made in obedience thereto, will be sustained. These legal conclusions, however, rest upon reasoning peculiar to such a state of case, and cannot, in the nature of things, have any ap-

plication to an agent. [Billings on Awards, p. 54.] It follows from what has been said, that an attorney at law, retained to collect a debt, or to institute a suit, cannot, before the action is instituted, submit the matter to arbitration; and to authorize an agent to exercise such a power, it must be expressly conferred or embraced within the authority explicitly granted. The question then, upon this branch of the case is this, did the power of attorney, or letters, directly or incidentally authorize the agent to refer the matters in controversy between the plaintiff and defendant to the arbitrament of third persons?

The letter of attorney authorized Allen "to sue, ask for and demand all sums or moneys due me (defendant), or which may become due, in the hands of Newman Reynolds, and all other persons whatsoever;" and subjected the principal to suit through his agent, as if he was personally present. The first branch of the authority conferred, had reference to the collection of debts which might be due to the principal from all persons, but from the plaintiff in particular. This contemplated the defendant as a creditor, and the agent as an actor, in obtaining payment, either by demanding it in person, or by legal coercion; but does not authorize him to take any step by which his principal may be made a debtor. The second branch must either be construed literally, that is, to be subject to the service of process, &c. when a suit is instituted in usual form, or else to be suable as the substitute of his principal in respect to all matters which concern or grow out of his agency. In this view, it is clear that the letter of attorney does not confer the power to submit, at least until after a suit is brought.

From the two first extracts from the defendant's letters, there can be no pretence of authority to submit to arbitration. In the third, he says, if "you" can honorably and fairly settle with Reynolds for me out of court, do so, if not, let the court and jury settle. This instruction contemplates a settlement by the personal agency of Allen, and not by a substitute or the arbitrament of persons selected by him and the plaintiff. One who has a bare power or authority from another to do an act, must execute it himself, and cannot delegate it to another, unless such an authority is given him

by express terms. The power of substitution may however be implied, where it is indispensable by the laws in order to accomplish the end; or it is the ordinary custom of trade; or it is understood by the parties to be the mode in which the particular business would or might be done. Mr. Justice Story, in his treatise on agency, thus briefly sums up the law on this point, as deduced from the decisions, viz: "The authority is exclusively personal, unless from the express language used, or from the fair presumptions growing out of the particular transaction, or of the usage of trade, a broader power was intended to be conferred on the agent." § 13, 14, 15. If the submission to referees be the delegation of the authority which was deputed to the agent, the general rule we think should be applied, and there is nothing in the present case to bring it within the influence of either of the exceptions.

We have seen that an authority to settle an account, or all accounts, without restriction as to the mode of settlement, does not permit the agent to bind his principal by note. Is not a submission to arbitration, and an award consequent upon it, more conclusive of the rights of the principal, than making a note? It certainly is, and if, upon authority, the latter is not allowable, we think upon principle, the former cannot be tolerated. Hence we conclude, that the power we are considering does not embrace an authority to submit to arbitration.

The letter of the 30th April confers no power, but merely suggests as a prudential measure, whether it would not be better for the agent, whenever he attempted to settle, to do so in the presence of some gentlemen of truth. The letter of the 16th May, merely refers to the advice contained in the preceding, and says that the writer had no objection, if his agent thought it best to settle in some other way—he believed that the plaintiff intended "to wrong" him, and was willing that the agent should exercise a prudent discretion. In the last letter, the defendant repeats what he says he had always said, viz: settle with the plaintiff if you can by exercising a prudent discretion, even at a reasonable sacrifice. If no settlement can be effected, he directs suit to be brought. The letter of May expressed a willingness that

the agent should disregard the suggestion contained in the letter of April, and both that and the one subsequently written authorize him to exercise a prudent discretion, and the latter even authorizes him to submit to a reasonable loss. Every agent with power to settle accounts generally, is invested with reasonable discretion, and the only additional authority is that, which allows him to submit to a reasonable sacrifice. It results, from what has been said, that the several letters last considered, will not support the submission to referees, and that the alternative of the agent, if he could not effect a settlement by the exercise of his own personal efforts, was to institute a suit.

3. Where a writing exists, it is generally the exclusive medium of proving the transaction to which it relates. [3 Phil. Ev. C. & H's Notes, 1208, *et seq.*] It is incumbent upon the party who objects to the admission of parol proof because there is written evidence of the same fact, to show that there is such a writing. In the case at bar, one of the arbitrators stated that according to his best recollection, their award (which evidenced the making of the note declared on) was written out. This was equivalent to the expression of a confident belief of the fact; and although the witness could not positively affirm it, yet according to all analogy, it was quite sufficient in the absence of opposing proof to exclude parol testimony, if it had been otherwise unobjectionable.

4. If the witness could have testified from his own knowledge to the payment of the \$400 on the note of the defendant to Flewellen, or if perhaps it appeared that the note had been fully paid off, so as to warrant the presumption of its destruction, then the parol evidence of the credit indorsed would have been admissible. [The P. & M. Bank of Mobile v. Willis & Co. 5 Ala. Rep. 783.] But in the absence of such additional proof, it should have been rejected.

The consequence is, that the judgment must be reversed, and the cause remanded.

WHITEHURST v. WARD.

1. That the plaintiff was guilty of the offence charged, or that the defendant had probable cause for the prosecution, is a full answer to an action for a malicious prosecution.

Writ of Error to the Circuit Court of Henry.

ACTION on the case, by Ward against Whitehurst, for a malicious prosecution, in charging the plaintiff with the crime of larceny by suing out a warrant without reasonable or probable cause. The defendant pleaded—1. Not guilty. 2. If Any warrant was sued out, it was from probable cause.

At the trial, the defendant introduced evidence tending to prove—1. Justification. 2. Probable cause. And thereon moved the court to charge the jury—

1. That if they believed the plaintiff was guilty of larceny, as charged in the warrant, they should find for the defendant.

2. That if they believed the prosecution was instituted upon probable cause, and without malice, they should find for the defendant.

3. That when the bill of indictment is refused by the grand jury, the determination of the prosecution must be shown by the indictment, and the return "not a true bill."

4. That *under the pleadings*, if the jury believed there was probable cause for the defendant to commence the prosecution, they must find in his favor.

These charges were all refused, and the jury instructed in reference to the first, second and fourth, that justification and probable cause, under the pleadings, would only go in mitigation of damages.

The defendant excepted, and here assigns the several rulings as error.

JACKSON, for the plaintiff in error, cited *Hazard v. Purdom*, 3 Porter, 43.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—The error in this case is clear. The want of probable cause is the essential ingredient in a malicious prosecution, and if the fact is in accordance with the charge, or if the prosecutor had probable cause to believe it to be so, this is a sufficient answer to the action. To this effect are all the text books and decided cases. [3 Steph. Ni. Pri. 2278, and cases there cited.]

Judgment reversed and cause remanded.

COWART v. HARROD & FLOURNOY.

1. A defendant who offers to file an insufficient answer, to purge a contempt, cannot claim as a matter of right to amend the answer. The motion should have been for leave to file a sufficient answer.
2. The objection that the publication by the master, did not sufficiently state the facts and objects of the bill, cannot be raised for the first time in this court.
3. A decree may be made against a resident defendant, who fails or refuses to answer, after service of process.
4. A decree against a non-resident, may be rendered, with a condition, that the complainant shall not enforce it, until he executes the refunding bond required by the statute.'

Error to the Court of Chancery for Barbour County.

THE bill was filed by the defendants in error, judgment creditors of J. E. P. Cowart, to set aside a conveyance made by him of all his property, to William Cowart, alledged to

have been made in fraud of his creditors. J. E. P. Cowart being a non-resident, publication was made, and a decree *pro confesso* was taken against him. A decree *pro confesso* was also made against William Cowart, upon whom process was served. At the trial term, the chancellor set aside the decree against the latter, upon his filing a full and complete answer. An answer being filed, it was excepted to by the complainants, and referred to the master to report upon the exceptions, who reported the answer sufficient; but on appeal to the chancellor, the report of the master was reversed, and the answer rejected. And thereupon the chancellor proceeded to render his decree, granting the relief sought by the bill.

The decree was accompanied by an order, that it should be suspended as to the non-resident defendant, until the complainants executed the bond which the law required in cases of decrees against non-residents.

The assignments of error are—

1. In sustaining the exceptions to the master's report.
2. In not allowing a defendant to amend his answer.
3. In suppressing the answer altogether, and not allowing it to stand for the matter sufficiently answered.
4. In not requiring the complainants to give bond, before the decree was rendered.
5. Because the order of publication does not state the facts and objects of the bill.
6. In rendering a decree against a resident, without proof.

J. COCHRAN and P. T. SAYRE, for plaintiff in error, cited 1 Barbour's Ch. P. 134; 6 Ala. 299; and the 17th Rule C. Practice.

BURFORD, contra, referred to 7 Ala. 262; Clay's Dig. 351, § 37-39.

ORMOND, J.—In our opinion, the answer was wholly insufficient, and the chancellor correctly refused to permit it to be filed under the order, that the defendant might purge the contempt, by filing a full and complete answer.

The defendant, under such circumstances, could not claim

as a matter of right to amend the answer. Indeed, the answer being rejected, there was nothing to amend, but the application should have been for leave to file an answer. So far as we can judge from the record, neither this, or a motion to amend, was made to the chancellor.

The objection, that the publication, made pursuant to the order of the chancellor, did not sufficiently state the facts and objects of the bill, cannot be raised for the first time in this court. The record states, that a copy of the order of publication, and a brief of the bill, was posted upon the courthouse door, and published in a newspaper designated in the order, pursuant to the order, and if the abstract or brief of the bill, was not sufficient to apprise the non-resident of the contents of the bill, objection should have been made to it for insufficiency. We cannot assume that it was not sufficient, and it was not necessary that the chancellor should cause the evidence of the fact to be embodied in his decree, or spread upon the record.

The act of 1841 authorizes a decree to be made against a resident defendant, served with process, who fails or refuses to answer. [Clay's Dig. 354, § 58.]

There is no objection to the decree as rendered, requiring the complainants to execute a bond, and suspending the execution of the decree, until such bond is executed. The literal terms of the act, do, it is true, require the complainant to execute a bond, before he obtains the decree; but this cannot be literally construed, as the condition of the bond must recite the decree. It follows necessarily, that the meaning of the act, is, the complainant should give bond before he is allowed to have the benefit of the decree; and if he should attempt to enforce the decree, without executing the bond, on application to the chancellor it would be superceded.

We can perceive no error in the record. Decree affirmed.

McMEKIN v. BOBO, ADM'R DE BONIS NON.

1. Where the allegations of a petition for leave to sell the land of a decedent are denied by the answer, the necessity for the sale must appear upon the record by depositions taken as in chancery cases.
2. The testimony of one witness, is not sufficient to outweigh the denial of the answer. The statement of a witness that there was a note against the deceased, in the hands of an attorney, upon which suit had been brought against the administrator, is not sufficient, without proof of the genuineness of the signature, or the liability of the estate for its payment.
3. The costs of the probate of a nuncupative will, cannot, whilst the probate is in litigation, be considered a debt for which the lands of the estate may be sold by order of the orphans' court.

Writ of Error to the Orphans' Court of Franklin.

THE defendant in error filed his petition in the orphans' court, alledging that there was "not sufficient personal estate of the decedent in this State," within his knowledge "to pay off and discharge the debts and legacies due from said estate to his creditors." He then designates certain tracts which he affirms that the intestate owned in fee simple, at the time of his death, which he prays may be sold under an order of the court, "to pay the debts of said decedent's estate." The petition then states the names of the intestate's heirs, their ages and residence.

Thereupon the court made the usual order of publication for forty days. The heirs of the intestate answered the petition at length, and objected to a sale of the lands. 1. Because the intestate left a personal estate, consisting of slaves, money, evidences of debt, &c., amounting in value to \$9,075 25—a sum more than sufficient to pay all the debts of decedent, with the expenses of settling his estate and all legacies; that in September, 1843, letters of administration were granted to Nathaniel L. McMekin, and the personal estate went into his hands to be administered, that he executed the

proper bond, and himself and sureties are abundantly able to respond to all liabilities. 2. Because on the 8th January, 1844, that administrator made a final settlement in due form with the orphans' court of his administration of the estate, when there appeared to be in his hands an excess of money amounting to \$600, at least, beyond all expenses and debts, which under an order of court "was distributed to the heirs." 3. Because, on the day of the settlement of the estate, the orphans' court appointed "commissioners to divide and distribute the personal estate of the deceased among his heirs," and that personal estate appraised at \$9,000 was thus distributed. 4. Because the heirs had, previous to the appointment of an administrator *de bonis non*, sold the lands in question to Wm. Sugg. 5. Because the deceased left a widow named Elizabeth McMekin, who is not made a party to the petition. 6. Because the will of the deceased, (if any existed,) touching which administration with the will annexed was granted to the petitioner, was a nuncupative will, not made as the statute requires, in order to pass lands, and the lands could not be adjudged to be sold to pay the legacies which it possessed to give; and that there are no debts or liabilities of the estate which would require a sale. 7. Because to the application for the order of sale, A. C. McMekin, one of the heirs, filed his bill in chancery, for the purpose of setting aside the pretended probate of the supposed will, on which bill process issued, and suit is still pending. Suits are also pending at law against the sureties in the administration bond of N. L. Mekin.

The answer concludes with a demurrer to the petition, assigning as causes—1. That it does not alledge that the personal estate of the deceased was not sufficient for the payment of the just debts with which it is chargeable. 2. That it does not alledge that the real estate cannot be fairly, equally, and beneficially divided amongst the heirs or devisees.

In their response, the heirs refer to the records of the orphans' court, &c. to sustain the allegations which they aver rest upon such proof—some of which are exhibited as part of their answer.

The deposition of J. H. Trimble was taken at the instance

of the petitioner, in which the witness states that more than two hundred dollars are due to the officers of the orphans' court, from the estate of the deceased, which "accrued in the probate of the last will and testament of the decedent;" that there is also a legacy of two thousand dollars due and unpaid under that will, to Andrew McMekin, which will appear by reference to the will admitted to probate on the 5th March, 1844. There is also a claim, purporting to be a note of the decedent, in the hands of S. R. Cockrell. In whose favor this claim is, witness does not recollect, but suit has been brought on it by Cockrell against the petitioner, as administrator *de bonis non* of decedent's estate. Witness also states, that he knows of no personal estate of the decedent in the State of Alabama, but from what he does know, believes there is no such estate therein.

Thereupon the judge rendered his decree, stating that it appeared "to the satisfaction of the court, from proof regularly taken by deposition, as well as from the exhibition of a certain note, purporting to have been executed by said decedent, that the estate of said intestate is indebted." It is then ordered, that the administrator proceed to sell five distinct parcels of land, which in the aggregate, according to the usual government surveys, contain about three hundred and and twenty acres.

W. COOPER, for the plaintiff in error, insisted, that the petition was defective in asking a sale of the lands, not only to pay debts, but legacies also; that to satisfy the latter, the statute did not authorize the orphans' court to decree a sale of the lands of a decedent. But if it did, there was no evidence that there was a will of any description; that the petitioner did not describe himself as executor, or as administrator with the will annexed. If there was a nuncupative will, it must be inoperative, as it respects the lands of the testator; because the statute requires that a will, to have that effect, should be signed by the testator, and attested by at least three witnesses.

There was no proof of the indebtedness of the estate to any extent, or if any, not enough to absorb the entire personal estate, which was first liable; and therefore the court

should not have directed the sale of the lands. But if the evidence authorized a decree in favor of the petitioner, the decree itself is erroneous in directing a sale of all the lands—it should have ascertained the extent of the indebtedness, and then have ordered a sale of so much of the land as it was necessary to sell in order to pay the debt.

For any thing appearing to the contrary, the personal estate was ample, and if not in this State, it may have been elsewhere under the control of the administrator, and on this point, both the petition and proof are at fault. The counsel cited Ram. on Assets, 86, 94, 228, 230; 3 Johns. Ch. Rep. 319; 4 Porter's Rep. 52, 60; 1 Stew. Rep. 429; 2 Ala. Rep. 662; Clay's Dig. 225, § 19; 11 Wend. Rep. 361; Toller's Ex'rs, 225; 9 Porter's Rep. 697; 8 Id. 380; 3 Id. 9, 26 to 31; 7 Id. 541; 3 Ala. 316; 5 Id. 347; 7 Id. 256; 2 Stew. Rep. 420, 423; Ram. on Assets, 109, 130; Toller's Ex'rs, 7; 2 Atk. Rep. 272; 14 Mass. Rep. 421; 4 Conn. Rep. 536; 8 Id. 5; 10 Wheat. Rep. 229; 1 Vernon's Rep. 336; 1 P. Wms. Rep. 505; 2 Ball & B. Rep. 49; Chit. on Con. 6, 7; 18 Johns. Rep. 145; 1 Chit. Prac. 104, *et seq.*; Swimb. on Wills, 18; 2 Kent's Com. 444; 1 P. Wms. Rep. 404; 1 Ves. Rep. 546; 3 Binn. Rep. 366.

J. A. NOOE, for the defendant in error.

COLLIER, C. J.—It is declared by the act of 1806, that the goods and chattels, or personal estate of any person deceased, whether testator or intestate, shall stand chargeable with the payment of all the just debts and funeral expences of the deceased, and the charges of settling the estate; and after payment thereof, in case of intestacy, shall be distributed. If the personal estate is insufficient to pay the debts, then the real estate shall be chargeable with the deficit. [Clay's Dig. 191, § 1.] The act of 1822, provides that it shall be lawful for an administrator, for the purpose of paying debts, or to make more equal distribution among the heirs, to file a petition in the orphans' court of the county in which letters of administration have been granted, setting forth that the personal estate of the intestate is not sufficient for the payment of the just debts of the intestate; or that the real

estate of the intestate cannot be equally, fairly and beneficially divided among the heirs, without a sale of the same, setting out and particularly describing in such petition, the estate proposed to be sold, and the names of the heirs and devisees of such intestate, &c. [Clay's Dig. 224, § 16.] By a statute passed in 1828, it is provided that, whenever an administrator shall fail to apply to the orphans' court for the sale of the real estate of his intestate, for the purpose of paying the debts, the judgment creditor, upon filing a suggestion in the clerk's office in which the judgment shall have been rendered, that real estate has descended to the heirs, and that a sale of the same or some part thereof, is necessary for the satisfaction of such judgment, and that the administrator has failed or refused to make application for the sale thereof, &c. may sue out a *scire facias* against the administrator and heirs, returnable to the next term, &c. requiring them to show cause why the plaintiff should not have execution against the real estate; and if sufficient cause to the contrary be not shown, execution shall be awarded against such estate: Further, if an administrator shall fail to apply for leave to sell real estate three months after reporting the estate insolvent, he shall be deemed guilty of a *devastavit*, and may be sued on his bond, together with their sureties. [Clay's Dig. 197, § 27.]

In Thrash v. Sumwalt, 5 Ala. Rep. 13, it was said that "an administrator is bound to a creditor of the intestate, in consequence of the assets which come to his hands to be administered; and a distributee has no claim whatever, until the demands of all creditors are satisfied or legally barred." He cannot, therefore, discharge himself or the assets from liability to the creditors by a premature settlement with the distributees, or by a decree of the orphans' court directing distribution. To the same effect, is Dean, et al. v. Portis, Judge, &c. 11 Ala. Rep. —.

In the case at bar, the record establishes that the personal estate of the intestate was ample for the payment of its debts; that the first administrator, within two months and a half after his appointment, filed his account and vouchers for a final settlement, and that in little more than four months, the account was allowed, and a decree rendered distributing

the personalty. In about eleven months after the settlement, and distribution, the defendant in error was appointed an adm'r *de bonis non*. It may well be asked under this state of facts, if the personal estate was insufficient to pay the debts. If it was not, where was the necessity for selling the lands, and does the act of 1822, furnish an authority for the decree of the orphans' court? Does the premature settlement and distribution discharge the first administrator and his sureties from liability to creditors? We merely state these questions, but do not propose to answer them, as we can rest our judgment upon another ground.

The fourth section of the act of 1822, above cited, provides, that the orphans' court shall not order a sale of the real estate described in the petition, where the allegations are denied by the answer, unless satisfied by proof to be taken by deposition as in chancery cases, and filed in the cause.—[Clay's Dig. 225, § 19.] In Hill and another v. Hill, adm'r, 9 Ala. Rep. 793, we said this provision was too explicit to leave room for doubt as to its true meaning; that it required depositions to be taken and filed, as in suits in chancery. It was not enough, that the decree recited, it appeared to the court by "interrogatory," that the personal estate of the intestate was insufficient to pay the debts with which it was chargeable, where the record contained no depositions, did not account for their absence, or show that any had been taken.

In the case before us, there was but one deposition taken to sustain the allegations of the petition. The answer of the heirs explicitly denies that there is any indebtedness which makes it necessary to sell any part of the real estate of the intestate; insists that the will, in respect to which the witness Trimble testifies, was not written, but attempted to be established as a nuncupation; and as such, cannot affect or charge the lands. The costs, which the witness testifies are due, accrued on the probate of this will; and the answer avers that the validity of the same is now controverted by suit in chancery, and offers to exhibit the papers in the cause.

Even if land passed by a nuncupative will, or could be charged by it with the payment of legacies, [Hilliard and wife v. Binford's heirs, &c., 10 Ala. Rep. 977,] it may be re-

marked, that the statute cited, does not authorize the orphans' court to order the sale of real estate for the payment of a legacy ; and if it did, the petition does not ask it for that purpose.

Can real estate be sold for the payment of the costs consequent upon the probate of a nuncupative will ? Whatever answer this question may receive, we think these costs can not, while the probate is in litigation, be considered a debt for which the lands of the estate may be sold under an order of the orphans' court.

The proof in regard to the indebtedness of the estate by note, is not sufficient ; especially where the answer denies the *gravamen* of the petition. The witness knows nothing of the genuineness of the note, but merely states that there is a claim purporting to be a note of the deceased, in favor of whom he does not know, in the hands of an attorney for collection, and that suit has been brought thereon against the administrator *de bonis non*. The decree on the petition merely states in addition, that this note was produced in the orphans' court. If the positive testimony of one witness was sufficient to outweigh the answer as to the fact of indebtedness, it might be objected to the deposition in the present case, that it does not affirm that the note is genuine, or state any thing as to the liability of the estate of the deceased to pay it. The fact that the note was produced in court, if it be proved by the recital, does not aid the deposition ; for taken alone, or in connection with the deposition, it does not show a charge upon the estate. This much should have been shown by proof, which would be satisfactory, where there was a negative answer in a chancery cause.

Without stopping to consider the other questions raised at the argument or by the answer, we think the proof too defective to sustain the decree.

The decree is therefore reversed, and the cause remanded.

DENT, ET AL. V. THE STATE BANK.

1. Where a debtor owing two debts to his creditor, pays a sum of money in gross, and the creditor omits to apply it to either, the debtor, when sued on one of the debts, may insist on the payment to be applied in discharge of that, although the creditor has delayed both debts. *Quere*, if the payment was made for the purpose of extending both debts, and receipted in this way, whether it should not be applied *pro rata*?

Writ of Error to the County Court of Tuscaloosa.

MOTION by the Bank, for judgment against Pattison and Dent, as indorsers of a bill of exchange, drawn and accepted by R. Caruthers.

The defendants, with other pleas, pleaded payment.

At the trial the defendants proved the payment of ——— dollars. It was also proved that, at the time of this payment, there were two bills between the same parties, held by the bank—that there was no specific application of so much of the payment to this bill, and so much to the other; and the payment was never specifically applied to either debt.

The defendants asked the court to charge the jury, that if the payment was in gross, and the bank had made no specific application of so much to each bill, then the defendants had the right to insist on the application of the payment to the bill in suit. This the court refused, and the defendants accepted.

The court charged the jury, that if the payment proved amounted to an extension of both debts, and there was no appropriation by the bank of a stated amount to the credit of each debt, the payment must be regarded as appropriated to each, *pro rata*, and so they must find. The refusal to charge as requested, and the charge given, are assigned as error.

PECK, for the plaintiff in error.

P. MARTIN, contra.

GOLDTHWAITE, J.—Both parties concede the rule, that a debtor, when paying money where several debts are owing, has the right to direct its application to either, and if he omits the direction, the right devolves on the creditor; but the defendants contend that as the creditor has made no application of the payment to either debt, they now have the right to assert it, in discharge of the present suit. We think they were entitled to have the law so declared upon the facts in proof before the jury, inasmuch as there were no circumstances, from which it could be lawfully inferred the several debts were extended by reason of this payment.

If the bank was prepared to show the money was paid for the purpose of extending both debts, and that in point of fact, both were extended, or delayed, in consequence of the payment, it is possible the acceptance of the money under such circumstances, of itself, would be an appropriation by the debtor, and they might have been left to the jury, as sufficient to warrant them in the conclusion that such was the intention of the parties. There was, however, no evidence of the circumstances under which the payment was made, or indeed, that the debts were extended in consequence of the payment.

We think the court erred in refusing the charge requested. Judgment reversed, and cause remanded.

IVEY v. THE STATE.

1. The place where a contemplated duel is to be fought, is no part of the definition of the offence, and not necessary to be averred in the indictment, or proven on the trial.

2. An allegation, that the prisoner *gave* the prosecutor a challenge to fight in single combat, is equivalent to an averment that he *challenged* him to fight.
3. No particular form of words is necessary to constitute a challenge to fight a duel; whether challenge to fight in single combat, with deadly weapons was intended, or whether it was the mere effusion of passion, or folly, or the idle boast of a braggart, not intended at the time to lead to any result, or to be understood by the other party as a challenge to fight a duel, are questions which the jury must determine.

Error to the Circuit Court of Dale.

THE plaintiff in error, was indicted for challenging one Calloway to fight in single combat, with deadly weapons.

The indictment is to the following effect: The grand jurors, &c. on their oaths present, that Miles G. Ivey, late of said county, on the first day of March, in the year of our lord one thousand eight hundred and forty-five, in the county aforesaid, did unlawfully, and verbally, give a challenge to one J. Hesia Calloway, to fight him, the said Miles G. Ivey, in single combat, with a deadly weapon, to wit, a pistol, against the peace and dignity of the State, &c.

Upon the trial of the cause, upon the general issue, as appears from a bill of exceptions, the evidence tended to show, that the defendant, being armed with deadly weapons, came to the place where the prosecutor, Calloway, was, and told him, that he had come to have a difficulty with him, and would fight him in any way, and at any place; and a few minutes afterwards, laying his hands on a pistol, told the prosecutor to prepare himself in half a minute.

The court charged, in relation to the challenge to fight with pistols, that if the challenge was given in general terms, to fight with deadly weapons, and the jury believed that such weapons included, or were intended by the defendant to include pistols, it was sufficient, so far as the indictment charged, that the challenge was to fight with pistols, if the other requisites necessary to constitute the offence, were made out. To which the defendant excepted.

The defendant, after conviction, moved to arrest the judg-

ment, upon the ground that the indictment was insufficient; which was refused, and the prisoner sentenced to the penitentiary for two years.

PORTER & BRODIE, for plaintiff in error.

The charge was not called for by the evidence, and tended to prejudice the prisoner. This indictment is insufficient—1. In not stating whether the challenge was to fight in or out of the State. A challenge to fight in, and one to fight out of the State, are distinct offences, and to include them in one count, would render it void for duplicity. [2 Mass. 163; 2 Lord Raym. 1572; 9 Wend. 203; Archb. Cr. Pl. 25; State v. Lohman, Riley's Cases, 72.]

2. The indictment was faulty in not alledging who the challenged party was. [State v. Absence, 4 Porter, 397; 1 Chitty's Crim. L. 281-2-3; 3 Ib. 849; State v. Rushing, 2 N. & McC. Rep. 560; State v. Foster, 3 McC. 442; State v. Raines, Ib. 533.]

ATTORNEY GENERAL, contra.

ORMOND, J.—The statute upon which this indictment is founded, reads thus: "Every person who shall give, accept, or knowingly carry a challenge, in writing, or otherwise, to fight in single combat, with any deadly weapon, either in or out of the State, and be thereof convicted, shall be punishable by imprisonment in the penitentiary for two years."—[Clay's Dig. 414, § 11.]

Two objections are made to the indictment—that it is not alledged whether the challenge was to fight a duel, within this State, or beyond its limits—and that it is not alledged who was the person challenged.

The offence denounced by the statute, is the giving, accepting, or knowingly carrying a challenge, to fight in single combat, with any deadly weapon, and the offence is complete when the challenge so to fight is given, accepted, or knowingly carried, whether the place where the rencounter is to take place, be designated or agreed upon, or not, or whether, if designated or agreed on, it is within or without the State. The place where the duel is to be fought, if agreed

on, or designated by the challenger, is no part of the definition of the offence, and is only mentioned in the statute for the purpose of showing that it is not a constituent of the crime. It follows, that as it constitutes no part of the offence, it is not necessary it should be averred in the indictment, or proved on the trial.

The other objection is alike untenable. The allegation that the prisoner *gave* the prosecutor a challenge to fight in single combat, is precisely equivalent to an averment that he *challenged* him to fight, and is indeed the precise language employed by the legislature in defining the offence.

The question upon the charge of the court, arises upon the sufficiency of the evidence to establish the allegation in the indictment, that the prisoner challenged the prosecutor to fight him in single combat, with a deadly weapon, to wit, a pistol. The language of the act is, "to fight in single combat, with any deadly weapon." Whether such a challenge was given, as was charged in the indictment, was a question for the jury upon the evidence. No particular form of words is necessary, to constitute a challenge to fight a duel. The real intention is frequently, and indeed most usually understood by the parties, whilst the invitation, or "demand of satisfaction," is couched in general terms.

In this case, the intent of the prisoner was left to the jury, and they were in substance instructed, that if there was a challenge to fight with deadly weapons, given by the prisoner, to the prosecutor, in general terms, they might infer it was a challenge to fight with pistols. There can be no doubt of the propriety of this charge, under the evidence before the jury. The prisoner, it appears, told the prosecutor he had come to have a difficulty with him, that he would fight him in any way, and at any place, and shortly afterwards laying his hand on a pistol, told the prosecutor to prepare himself in half a minute. Certainly the jury were authorized to infer, that if this was an invitation to fight a duel, it was a challenge to fight with pistols, and is indeed much more precise, and specific, than such invitations usually are. This appears to have been the only question made upon the evidence, and the court instructed the jury, this inference was proper, if the

other requisites necessary to constitute the offence were made out. The jury must therefore have ascertained from the proof, that the intention of the prisoner was to challenge the prosecutor to fight him in single combat, with a deadly weapon, and that it was not the mere effusion of passion, or folly, or the idle boast of a braggart, not intended at the time to lead to any result, or to be understood by the other party as a challenge to fight a duel.

Let the judgment be affirmed.

HOLFORD v. ALEXANDER, ASSIGNEE.

1. The judgment upon a writ of error *coram vobis*, is, that the judgment complained of be *affirmed*, or *re-called*, according as it may be for the plaintiff or defendant; and if for the former, then the suit is placed in the same situation as it was when the judgment was rendered. An order to this effect cannot make that interlocutory which would be otherwise final.
2. Upon a writ of error *coram vobis*, error cannot be assigned, which contradicts the record. It cannot be assigned, that a corporation against which a judgment had been rendered, had ceased to exist previous to the rendition of the judgment, that fact having been put in issue, and determined in the judgment sought to be reversed.
3. Upon such a writ, the authority of the attorney who represented the supposed corporation, cannot be questioned.
4. A writ of error *coram vobis*, can only be prosecuted by one who is a party or privy to the record, or injured by the judgment.

Error to the County Court of Russell.

THE defendant in error, by his petition addressed to the judge of the county court, stated, that at the August term, 1843, of that court, the plaintiff recovered a judgment against the Planters and Mechanics Bank of Columbus, an institution incorporated by an act of the legislature of Georgia, for the sum

of thirty thousand dollars. *Further*, that in a certain proceeding had on behalf of the State of Georgia, in the nature of a *quo warranto*, in the superior court of the county of Muscogee in that State, it was adjudged that the charter of the corporation was forfeited, and its privileges and franchise should forever cease; that the superior court of Muscogee is a court of common law, and had full and complete jurisdiction of that proceeding. It is also stated, that by the law of the land, upon the forfeiture of the charter, no legal proceedings could be had against the corporation; "and that at the time of the rendition of the judgment herein referred to, the said corporation of the Planters and Mechanics Bank of Columbus, was without form and void, and had totally ceased to have any and all existence."

Petitioner further shows, that previous to the forfeiture of the charter, the corporation made and executed to him an assignment of all its effects, for the benefit of all its creditors, which assignment was authorized by the laws of Georgia—and by an act of the legislature of that State, the appointment of the petitioner as assignee has been ratified and approved.

It is also alledged, that at the term of the county court of Russell above stated, upon the trial of the cause in which judgment referred to was recovered by the defendant in error against the assignor of the petitioner, certain persons without any warrant or authority appeared and pleaded as attorneys for the corporation, when in fact there was no such corporation in existence, and consequently could have been no authority to appear for it. Petitioner therefore insists that the judgment may be revoked, and that a writ of error *coram vobis* be granted, that the error in fact which has intervened in the rendition of the judgment may be inquired into, and the judgment forever held for nought. If petitioner, as assignee, has not the right to sue out such a writ, he prays that the writ be granted to him as an *amicus curiae*.

An order was made by the judge of the county court, that a writ of error *coram vobis* issue, according to the prayer of the petition, &c. The petitioner assigned for error in fact, that the corporation had ceased to exist previous to the ren-

dition of the judgment, which is here sought to be set aside.

The defendant moved the court to dismiss the writ, and quash the petition, on the ground of the insufficiency of both, and on the ground that the petition was sworn to before the clerk of the circuit court of Russell. This motion being denied, the defendant below demurred to the assignment of error, because it was insufficient to compel him to answer, and his demurrer was overruled.

The defendant then pleaded—1. That the facts alledged by the petitioner were untrue. 2. That on the trial of the action at law, wherein the defendant was plaintiff, and plaintiff's assignor defendant, the question whether the Planters and Mechanics Bank of Columbus existed as a corporation was put in issue and determined against the assignor, &c. 3. That since the rendition of the judgment in favor of the defendant against the assignor, the petitioner has recognized the same as valid and operative. 4. That in the sixth circuit court of the United States for the district of Georgia, held at Savannah, an action was instituted in favor of the defendant against the plaintiff's assignor, on the ———, 1846, for the same cause on which the judgment now sought to be reversed was rendered; and that to that action the petitioner on his own motion was made a defendant, instead of his assignor, and pleaded in his defence the former judgment recovered in the county court of Russell; and did thus recognize the validity of that judgment and avail himself thereof. In consequence of that plea, the defendant ceased to prosecute his suit in the sixth circuit, &c., and the same was abated for want of prosecution.

The petitioner moved to strike out the second, and demurred to the fourth plea, his motion was granted in respect to the former, and the demurrer sustained to the latter. Thereupon issues were joined on the first and third pleas, which were submitted to a jury, who returned a verdict for the petitioner, and judgment was rendered thereon, revoking and annulling the judgment against the assignor, and reinstating that cause on the docket.

On the trial, the petitioner offered in evidence an exemplification of the proceedings, in the nature of a *quo warranto*,

which were had in the superior court of Muscogee county, Georgia; the defendant objected to its admission on the ground that the attestation of the clerk of that court was not in due form; but the objection was overruled, and the evidence admitted. Thereupon the defendant excepted, &c.

W. DOUGHERTY, for the plaintiff in error, insisted, that no person can bring a writ of error to reverse a judgment who was not a party or privy to the record, or who was not injured by the judgment, and therefore is to receive advantage by the reversal thereof. [2 Bac. Ab. 457; Bar & Yeiser v. Stewart, 1 Bibb, 292; Vanhoose v. Frick, 3 S. & R. 278; 2 Tidd's Pr. 1134; 2 Williams's Saunders, 46, A.; 101, E.; Grout v. Chamberlain, 4 Mass. 611; 2 Kent's Com. 306.]

Nothing can be assigned for error which contradicts the record. [2 Tidd's Pr. 1168; 2 Bac. Ab. 489, 490; Wetmore, et al. v. Plant, 5 Conn. 541; Cook v. Conway, 3 Dana, 454; Helbut v. Held, 2 Strange, 648.]

If defendant in error stands in such a relation to defendant in action below, as to bring a writ of error, he ought to be made a party defendant, either on motion or *scire facias* as by the judgment of the court below the judgment rendered in the first instance, is merely recalled and not reversed, and the parties stand as before it was rendered. [11 Johns. 514; Arnold v. Sanford, 15 Johns. 534.]

E. W. PECK, for defendant in error, made the following points: 1. The writ of error to this court ought to be dismissed—1. Because there is no judgment in the court below in favor of the defendant in error, to be reversed. 2. Because, if any such judgment there be, it is not a final judgment. 3. Because the cause is yet pending and undetermined in the court below, and therefore the writ of error to this court is premature. 4. The remedy for the wrong complained of is not by writ of error.

2. The court below had power to issue the writ of error *coram vobis*. It is a power inherent in every court of general jurisdiction, that proceeds according to the course of the common law. Error lies in the same court where the judgment was given, when the error is not for any fault in the

court. [2 Sellon's Prac. 363.] So also for error in fact, the remedy is in the same court where the error was committed. [Comyn's Dig. Pl. 438, (2 B., 3 B. 1.)] Where an infant appears and pleads by attorney, and judgment against him, the remedy is in the same court, by writ of error *coram vobis*. [Meredith v. Saunders, 2 Bibb, 101.] So if defendant die before verdict on interlocutory judgment, (2 Saunder's Rep. 276, Ma. 101, a, note,) and judgment be notwithstanding rendered. So also in favor of one who is dead. [Rochester v. Anderson, 2 Bibb, 569.] So where action of assumpsit against two, and one of them die between verdict and judgment, and notwithstanding judgment be given. [Meggott v. Broughton, Cro. Eliz. 106; 2 Bac. Ab. 485.] In this case, judgment is rendered against a corporate body after it had ceased to exist. As a party in court, the corporate body was dead, and therefore no judgment could legally be rendered against it by the court. The judgment however being rendered, the death of the corporate body not being known to the court, the remedy was properly sought in the same court, on the authorities aforesaid. The distinction between this case and that of Wetmore v. Plant, 5 Conn. 541, is this, in that case the judgment was against Wetmore, the defendant in the court below, he had his day in court, and might have abated the suit by plea, but neglected to do so; here the corporation having ceased to exist before judgment, there was therefore no party defendant in court, either to make the objection, or against whom judgment could be rendered. The same may be said of the case of Cook v. Conway, 3 Dana, there was a party defendant in issue, a real party, and the record showed that he actually appeared. This the court would not permit him to deny on error. If an infant appear by attorney, he may have his writ, and assign the *fact*, although the record says, "*come the parties by their attorneys.*" He may assign the fact, because, being an infant he could not make an attorney. If an infant cannot make an attorney because he is an infant, can a party not *in esse* make an attorney? and if an attorney appear, may it not be shown that there was no party to make an attorney? In 2 Bacon, it is said, nothing can be assigned for error that contradicts the record, and gives the following case: In a writ of error

to reverse a fine, the plaintiff cannot assign that the conusor died before the *test of the dedimus*, because that contradicts the record of the conusance, taken by the commissioners, which evidently shows that the conusor was alive, because they took his conusance after they were armed with the commission, and the *dedimus* issued. Here the conusance made by the conusor, is itself a record, and taken by commissioners appointed for that purpose, so, to say he was dead when he made the conusance, contradicts the record. Yet the same author says, the plaintiff may assign, that the conusor died after conusance taken, and before the certificate thereof returned, because this is consistent with the record.

3. It is objected that the writ of error *coram vobis*, should have been quashed, because it is said that Alexander was neither party nor privy to the judgment. He is the assignee of the corporation, which it is not denied, in fact ceased to exist before judgment. Now, if the judgment be erroneous, in what way is the error to be corrected? No writ can issue in the name of the corporation, because its franchises have been seized by the State, and the corporation itself dissolved. I insist that the assignee is the party injured by the judgment, and may therefore have his writ of error. [2 Bacon's Ab. 457.] No person can bring error who is not party, or privy, or, who is not injured by the judgment. If a man recover land by judgment, and dies without heir, against whom the writ of error shall be brought, is, says this author, left a quere. [See 1 F. N. B. 102, 103, title *audita querela*] If the conusor of a statute aliens the land, and an execution is sued against the alienee, he may have a writ of error upon the execution. [2 Bacon's Ab. 459. See the note to this paragraph.] Does not Alexander, as assignee, stand in a like situation here, as the alienee did in the case cited. And it is necessary that the assignee should have his writ, to correct the error in this case, otherwise the judgment will operate to fix the rights of the plaintiff as a creditor of the defunct corporation, to the amount of the judgment, and the judgment will estop the assignee to deny that plaintiff is a creditor: he, therefore, ought to have his writ to avoid the judgment.

COLLIER, C. J.—It is argued for the plaintiff in error,

that the order of the county court, recalling the judgment against the Planters and Mechanics Bank of Columbus, is not a final disposition of that suit, and therefore the writ of error should be dismissed. This argument cannot be supported. True, the cause is directed to be reinstated on the docket, that it may be tried *de novo*, but this is the mere consequence of the revocation of the judgment, and if the judgment should not have been annulled, will become inoperative by a reversal of the order, and can interpose no obstacle to its revision.

The judgment upon a writ of error *coram vobis* is, that the judgment complained of be *affirmed* or *recalled*, according as it may be for the defendant or the plaintiff; and if for the latter, then the suit is placed in the same situation as it was, when the judgment was rendered. An order to this effect in the definitive entry in the case made by the writ of error cannot make that *interlocutory*, which would be otherwise *final*. As it respects the judgment which is vacated, the action of the court, is conclusive as to its vitality.

It frequently happens, that judgments of justices of the peace, in cases of forcibly entry and detainer, &c., which are removed by *certiorari* to the circuit court, are reversed, and a *venire de novo* awarded to the justice; or that judgments of reversal are rendered on error from the county to the circuit court, in which the causes are remanded. In such cases, appeals or writs of error have frequently been prosecuted to this court, without awaiting the further action of the justice in the one instance, or the county court in the other. These, it seems to us, are parallel in principle, to the case at bar. From this view, we conclude that the cause is regularly brought here, and that the writ of error should not be dismissed.

It is said to be a general rule, "that nothing can be assigned for error that contradicts the record; for the records of the courts of justice being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it." Under the influence of this rule, it has

been held, that on a writ of error to reverse a fine, the plaintiff cannot assign that the conusor died before the teste of the *dedimus*, because that contradicted the record of the conusance taken by the commissioners; but the plaintiff may say that after the conusance taken, and before the certificate thereof returned, the conusor died, because this is consistent with the record. So, where the record of a judgment recites that it was rendered by a court at which a judge mentioned, *eo nomine*, presided, it cannot be assigned, (though in fact the court was held before his deputy, according to the King's patent,) that, that judge was not there; for such allegation is contrary to the record. *Again*: It has been decided, for the reason above stated, that it shall not be assigned for error the defendant filed his warrant to defend, by A. B., his attorney, and that it appears on the judgment he appeared and defended, by C. D., his attorney." [2 Bac. Ab., title Error, letter K, 2. See also, 4 Dane's Ab. ch. 127, art. 7, § 6.]

In *Wetmore v. Plant*, 5 Conn. Rep. 541, it was said that nothing shall be assigned for error in fact, of which a party might have taken advantage in the court below, or which he should have pleaded in abatement; that the coverture of the plaintiff should be pleaded in abatement, and if the defendant pleads in bar, he shall not afterwards assign the coverture for error. So a suit brought by a person in his official character, after he has ceased to be an officer, can only be abated on plea; and if the objection is not thus taken, it cannot be insisted on after judgment, that nothing can be assigned for error that contradicts the record, as that the plaintiff was not the officer the declaration affirms him to be. So in *Goodright v. Wright*, 3 Johns. Rep. 437, it was decided, that if a defendant pleads infancy, and a verdict is found against him, he cannot assign for error, that he was an infant, and did not appear by guardian.

In the case at bar, it is alledged in the petition for a writ of error, that the Planters and Mechanics Bank of Columbus had ceased to be a corporation previous to the rendition of the judgment in favor of the plaintiff in error against it, and that certain persons, without any warrant or authority, appeared and pleaded as attorneys for that corporation. The

petitioner assigned for error, that the corporation had ceased to exist previous to the rendition of the judgment complained of; and the defendant below, by way of plea to this assignment, averred that on the trial of his suit against the bank, the question, whether it existed as a corporation, was put in issue and determined in the affirmative; thereupon the judgment was rendered in his favor, which he is ready to verify. This plea we have seen was stricken out on motion.

It has been supposed that the dissolution of the corporation, or the forfeiture of its franchises, has the same effect upon pending suits to which it is a party, as the death of a natural person. Assuming this to be so, and we must intend that the assignment of error affirms not only that the judgment was not in fact rendered, but the record was not in such a condition as authorized the clerk to perform the mere ministerial act of entering it, when the charter was annulled; and the plea as a denial must be regarded as coextensive with the assignment. This is a clear legal conclusion, if as it has been often decided that where a plaintiff or defendant dies after an order for judgment, or a verdict returned, the judgment may be perfected. In *Farley v. Lea*, 4 Dev. & B. 109, the testator died in term-time, before a judgment was signed; *it was held* that it might be signed after his death, for it is to be considered a judgment of the first day of the term, at which day the testator was alive. So where the plaintiff, in trespass *quare clausum fregit*, died after verdict in his favor, and before judgment, the court will enter judgment, as of the term in which the verdict was returned.—[*Goddard v. Bolster*, 6 Greenl. Rep. 427.] And where the plaintiff died after a verdict in his favor; pending a motion in arrest of judgment, such judgment may be entered as of a term after verdict, while plaintiff was living. [*Griffith v. Ogle*, 1 Binn. Rep. 172.] In *Perry v. Wilson*, 7 Mass. Rep. 393, the defendant died after the continuance of the cause for advisement by the court, and judgment was rendered as of the former term. And this court has often rendered judgment where a party dies after a cause has been submitted for its decision, as of a day of the term preceding his death. Let these citations, and this view of the law suffice to define the scope of the assignment and plea.

Upon a motion to quash a plea, the plaintiff is understood to admit it to be true, and deny its legal sufficiency as an answer. Taking this to be unquestionable, and the plea (if the petition does not,) shows that the assignment contradicts the record, in affirming that when the verdict was returned, the Planters and Mechanics Bank of Columbus had no corporate existence. This is the fact which it alledges was put in issue by the pleadings, and on which a judgment was returned against the bank.

It is not allowable on a writ of error *coram vobis*, to go behind this estoppel, and controvert the authority of the attorneys who represented the supposed corporation; for whatever might be the result upon such an issue, it would not remove the difficulty. The record would remain unaltered, and conclude the plaintiff in error from asserting a fact which denies its verity. This conclusion seems to us so obvious a sequence from the record before us, and the authorities cited, that it requires no farther illustration.

It is laid down in the elementary books, that a writ of error can be brought by him only who was a party or privy to the record, or injured by the judgment, and who consequently will derive advantage from its reversal. Heirs, executors, administrators, reversioners, remaindermen, terre tenants, or a husband who marries after a judgment against his wife, and perhaps others, who are not parties to the proceeding sought to be revised, may join in the prosecution of a writ of error. [5 Dane's Ab. ch. 137, art. 8; 1 Arch. Prac. 231; 2 Bac. Ab. tit, Error, B, Hill's heirs v. Hill's ex'rs, 6 Ala. Rep. 166; Yeiser v. Stevens, 1 Bibb's Rep. 292; Grout v. Chamberlin, 4 Mass. Rep. 611; Finney v. Crawford, 2 Watts' Rep. 294; Campbell v. Smith, 2 A. K. Marsh. Rep. 118; Bledsoe v. Wilson, 2 Dev. Rep. 314; Dougherty v. Compton, 3 Smedes and M. Rep. 100.] Is an assignee *by deed*, of one of the parties to a judgment, a privy within the meaning of the rule which allows one thus situated, to prosecute a writ of error? The view taken of the last point considered, relieves us from the necessity of answering this question, and we have merely suggested it, and cited authorities as we had them at hand, for the sake of convenience, should it become necessary to examine the point in some future case. [See further as to

the remedy by writ of error, *coram vobis*, in what cases it lies, the mode of proceeding, and judgment thereon—1 Arch. Prac, 234, 276 to 281: 5 Dane's Ab. chap. 137, art. 4, § 15; Ib. art. 7; 2 Bacon's Ab. tit. Error, K. 2; Cook v. Conway, 3 Dana's Rep. 454; Kennedy v. Pickering, Minor's Rep. 137; Colson's ex'rs v. Wade's ex'rs, 1 Munf. Rep. 43; Dewitt v. Post, 11 Johns. Rep. 514; Arnold v. Sandford, 14 Johns. Rep. 417; Maynard v. Downer, 13 Wend. 575; Case v. Riberlin, 1 J. J. Marsh. Rep. 29.]

We have said that the defendant in error cannot have the redress he seeks by the remedy he has adopted. If the facts stated in his petition are true, it may be conceded the judgment cannot be enforced to the prejudice of his rights as assignee; but how it is to be arrested or vacated, we need not now inquire. We have but to add, that the judgment of the county court is reversed, and if the defendant in error desires it, the cause will be remanded.

KEENAN v. STRANGE, ET AL.

1. When a chancery cause is remanded, with directions that a reference shall be made to the master, this will not warrant the master in acting on the matter without the order of the chancellor, and it is error to confirm his report made without an order.
2. When a decree is reversed and remanded, with directions to pursue a particular course, it stands, when remanded to the inferior court, as if the proper decree had been thus made in the first instance; and the chancellor upon a proper showing, may, notwithstanding the decree of the appellate court, set aside the defendant's default, and let him make his defence by answer.

Writ of Error to the Court of Chancery for the 16th District.

THE case made by the bill in this cause, will be found stated in the 8th vol. (Ala. Rep.) 816. The decree dismissing the bill, was there reversed, and one rendered, declaring the heirs of Westmoreland had a lien on the land purchased by the administrator, for the purchase money unpaid, and remanding the cause for a reference to the master, to ascertain the amount of the purchase money remaining due. When the certificate came from this court to the court below, the register, without any action by the chancellor, directed a reference to himself, under the supposition that such was the order of court, and reported to the next chancery term, that nothing had been paid by the administrator for the lands, and that \$8100 remained due. This report was confirmed at the same term, after being read for two succeeding days, and, as the entry recites, no exceptions being filed.

During the same term Keener filed his petition to set aside the report of the master, to open his default, and to be let in to defend. The substance of this petition, and the facts disclosed by it, (which are verified by affidavit,) may be thus stated.

Immediately after service of the *subpœna*, he procured counsel resident in Montgomery, but practising in the court of the 16th district, to prepare his answer to the bill, which was prepared and sworn to before the expiration of thirty days from service. From some cause, unknown to the petitioner, his counsel did not attend court the first day of the term, and the complainants then submitted the cause *ex parte*, but the chancellor dismissed the bill, on the ground it had no equity. On the second day of the term, the answer was left with the register, who has ever since had it, but as the bill was then dismissed, it could not be regularly filed. The cause was afterwards taken to the supreme court, and the decree reversed, and remanded. Of this the petitioner never heard, until some months afterwards, and did not know until about a month before filing his petition, of the nature of the decree pronounced. He did not hear of the reference, nor was he aware of being in contempt for the omission to file his answer, until the report was read, and then only became aware

of the fact, by his counsel being refused, permission to object to the report. At the time of making out his answer, he did not know that by the rendition of the judgment, upon the settlement of the administration of Westmoreland's estate, that the administrators were charged with the sale of the lands as *cash*, the right of the widow to one-seventh part of that sum, and to the further sum of \$2000 as dower, the satisfaction by the administrators of the share of Pettaway, one of Westmoreland's heirs, or the indemnity given by the administrators to Strange, another of the complainants, to secure him from loss as a surety on the administration bond. All these facts are alledged in an answer and cross bill, which the petitioner asked leave to file. His first answer, stating his defence, as a *bona fide* purchaser from Cozens, without notice of any subsisting title in Westmoreland's heirs.

The chancellor refused the petition, on the ground that the decree rendered by the supreme court, upon reversing the cause, was conclusive in his court, and that nothing remained to be done than but to carry out that decree.

The lands were therefore directed to be sold, and the proceeds, after paying the costs paid over to the complainants.

The defendant, Keener, now prosecutes his writ of error on this decree, and assigns that the court erred,

1. In confirming the master's report. 2. In refusing to set aside the report. 3. In not allowing the answer of the defendant to be filed. 4. In refusing to allow the amended answer and cross bill to be filed.

He also submits the record, with a motion for a *mandamus* to the chancellor, to allow him to file his answer, set aside the report, and open the decree.

CHILTON, for the plaintiff in error, and for the motion.

McLESTER and COCKE, contra.

GOLDTHWAITE, J.—1. When a chancery cause is remanded from this to the subordinate court, with directions, that particular proceedings shall be had—as in this instance, that a reference may be made to the master—we think the officer of the subordinate tribunal is not invested by force of

the order of this court remanding the cause, with authority to act in the matter of reference independent of the further direction of the court to which he is attached. The mandate of this court is to the subordinate court, and the future action of that tribunal is governed by the directions given. There are forcible reasons why the practice should be thus, and not the least so arises from the circumstance that the chancellor may prescribe when the reference shall be made—the proof on which the master is to act—the notice the parties shall receive, &c. &c.

Independent of the other questions raised, on the record, we consider the reference in this case was made by the master, and without any order to that effect from the chancellor, that is sufficient to reverse the decree, or or in other terms, the exception to the master's report on this ground should have been allowed.

2. This result being attained, we shall proceed to consider whether the decree rendered by this court on a former occasion precludes the chancellor from setting aside the default and letting the defendant in to make a defence by answer. It seems to us, that when a decree in a chancery cause is reversed, and the cause remanded for something further to be done, preparatory to the final decree on which execution may be had, the cause when it reaches the subordinate court, stands there precisely in the same condition as if that court in the first instance had rendered the same decree as afterwards pronounced by this court; with the exception, however, that the decree is no longer the subject of revision by writ of error. This indeed, is the evident meaning of the statute, which requires this court to render judgment according to the right of the matter, and award execution, unless it be necessary that facts be ascertained, &c. [Dig. 255, § 4.] Considering the decree rendered upon the writ of error as that which should have been rendered in the first instance by the chancellor, the question arises, whether he has the power to open the default, and let the defendant in to make defence by answer. The most forcible objection to the existence of this power is, the difficulty, with its allowance, of ascertaining when a chancery decree is final of the controversy, and the rights of the parties fixed. It must be conceded there is

great weight in this objection, if the power was now claimed for the first time, yet it cannot prevail against a continuous current of decision, establishing and recognizing the power. In England, it has been held that a decree *pro confesso*, had for the want of an answer whilst the defendant was of unsound mind, might be set aside. [Benson v. Vernon, 1 Ves. Sen. 206.] And this too notwithstanding the decree was enrolled. [Kemp v. Squire, Ib. 208.] Even when the decree is on the merits, it has been set aside on a showing of surprise in the party affected by it. [Stevens v. Guppy, 1 Turn. & R. 178.] The decisions in the American chancery courts are generally to the same effect. Thus in New York, a decree by default, enrolled and acted upon by selling under it, has been set aside and defence put in by answer, when the defendant had omitted to defend by the mistake of his counsel. [Malepaugh v. McBride, 7 Paige, 509; Tripp v. Vincent, 8 Ib. 176.] In Virginia, it is said to be the proper course of practice to open the decree whenever there is error which cannot be corrected by a rehearing, or on a bill of review. [Erwin v. Vint, 6 Munf. 279.] Even the neglect of counsel to attend at the hearing, has, in England, been considered a sufficient ground to open the decree. [Robson v. Cranwell, 1 Dickens, 91.]

We find nothing repugnant to the course of practice indicated by these decisions; but it is argued here, that a decree having been pronounced in this court upon the merits, this is subject to no revision here or elsewhere. The cases in the supreme court of the U. States, of *Exparte Sibbold*, 12 Pet. 492, and *Washington Bridge Co. v. Stewart*, 3 How. 413, are conclusive, if indeed any authority is required, that decrees of appellate courts cannot be reviewed by the courts themselves, in the proceedings of the same cause at a subsequent period. But that principle, in our judgment, is not presented here. The decree is, and must continue to be the law of the case as then presented; but this does not preclude the parties from applying to the primary court for leave to introduce matter upon the record which the justice of the case requires should be there, and which it would be a reproach to justice if there was no means to place there.

Without further extending this opinion, we think the decisions referred to are quite sufficient to show, that courts of equity possess the power to open a decree passed even on the merits, when a sufficient cause is shown, and the suit is not entirely ended between the parties. Whether relief could be afforded by opening a decree, where the subject matter had passed beyond the control of the court, or its decree was executed, we need not determine.

Our judgment in the present case is, that the chancellor possessed the power to set aside the default, and let the defendant in to make the defence by answer ; but we decline to enter on the question, whether the refusal would be revisable on error. When the cause returns to the chancery court, the defendant can renew and have a decision on his motion.

For the error already referred to, the decree is reversed and the cause remanded.

SAWYER v. PATTERSON.

1. An order setting aside a judgment, on condition that the defendant "would not plead matter in abatement, or the statute of limitations," is not confined to the declaration then on file, but applies equally to an amended declaration.

Error to the Circuit Court of Talladega.

ASSUMPSIT, by the defendant in error, as assignee of a promissory note. The plaintiff by leave of the court, was permitted to amend his declaration, by adding the words to the description of the note, "with interest from date," and thereupon filed an amended declaration, to which the defendant pleaded two pleas, *non assumpsit*, and the statute of limitations of six years.

The plaintiff then called the attention of the court to a former order in the cause, by which a judgment by default was set aside, and the defendant allowed to plead, on condition that he would not plead matter in abatement, or the statute of limitations, which condition was accepted, and thereupon, and to give effect to this condition, rejected the plea of the statute of limitations, and the defendant excepted.

This is now assigned as error.

S. F. RICE, for the plaintiff in error.

1. Whenever a new declaration is filed, or a material amendment made to an old declaration, the case is to be regarded as a *new case*, so far as to allow the defendant to plead to the new case thus made by such altered declaration, without regard to any agreement made whilst the old declaration was of force.

2. When an agreement not to plead the statute of limitations is made, such an agreement must be held to extend *only to the declaration then on file*, and to the case then made by the declaration then on file. Such agreement will not be construed to debar the defendant from filing such plea to an amended declaration, provided the plaintiff afterwards voluntarily materially alters his declaration. Agreements of that kind will be construed as applying only to the state of things as they actually existed when the agreements were made. And if a plaintiff will afterwards voluntarily alter the state of things, he cannot insist on the agreement, and thereby *abridge* the defendant's right to plead the statute of limitations to a *declaration essentially different*, and not in the *contemplation of the parties when they made this agreement*.

3. The agreement in this case was made by the intestate. And the amendment is made against the administrator. The amendment is material. See this case decided at the last term.

4. An agreement not to plead the statute of limitations to one declaration, cannot preclude the party from filing that plea to *another and different declaration*.

J. T. MORGAN, for the defendant in error.—1. As to the

right to require the plea of the statute of limitations, see 1 Gallison, 124, 125; 2 Tidd, 643, 644; Miller v. Watson, 6 Wendell, 506; Green v. Gill, 5 Mass. 379.

2. The statute was not a bar to this suit before the writ was served; and the agreement not to plead the statute must have been made with reference to the very predicament in which the cause is now placed.

ORMOND, J.—It is very certain, and indeed is not denied, that the court had power to impose terms upon the defendant, as the condition upon which he should be relieved from the effect of his default, the judgment against him be set aside, and he be permitted to plead to the action. The condition having been accepted, the only question is, whether it applied only to the declaration then on file, and whether he was exonerated from a compliance with its terms, upon the declaration being amended.

From the nature of the condition imposed on the defendant, and accepted by him, it appears that it applied to the action, and not to the declaration. The plea of the statute of limitations, which the defendant agreed not to plead, would go to the entire action, and not to the form of the declaration. It is impossible therefore to suppose, that the condition was imposed in reference to the declaration then on file; it was manifestly in reference to the debt sought to be enforced, as to which the defendant agreed, in effect, that it was not barred by the statute of limitations when the action was commenced. This agreement, from its very nature, must continue in force until the action, in reference to which it was made, is determined. The court therefore did not err in striking out the plea.

Judgment affirmed.

FAMBRO v. GANTT.

1. No title passes to the purchaser, by a *private* sale of the property of an estate by the administrator, although the administrator is estopped by his own act from recovering it, by an action in his own name. Nor can the administrator coerce payment of the purchase money, as no right can be derived from an unlawful act; and the contract being void in its inception, the defence may be made, without placing the other party *in statu quo*, by a return of the property.

Writ of Error to the County Court of Dallas.

THIS was an action of assumpsit at the suit of the defendant in error. The first count alleges that the defendant, in consideration that the plaintiff would execute to James H. Fiffe a bill of sale for certain negroes, particularly designated, being the mother and her children, and the family of one Lawson Thomas, and the property of the plaintiff, promised to pay to the plaintiff on the execution of the bill of sale, the sum of \$475. It is then averred that the bill of sale was executed, and together with the slaves delivered to the defendant, &c.

The second count charges, that the defendant having in his possession for collection, as an attorney at law, certain notes due to James H. Fiffe from the estate of Samuel M. Gantt, deceased, of whom the plaintiff and Sarah Gantt were administrator and administratrix, proposed to the plaintiff, that if he would execute a bill of sale to Fiffe for certain slaves, whose names are mentioned—being the mother and her children, the family of Lawson Thomas, and the property of the plaintiff, then he, the defendant, would pay to the plaintiff the further sum of \$475. The execution of the bill of sale, and the delivery of the slaves, are averred as above.

It is stated in the third count, that Lawson Thomas was indebted to the plaintiff in the sum of \$475, for property before that time sold and delivered him; and the defendant having in his possession funds belonging to Thomas suffi-

cient to pay that sum, in consideration that the plaintiff would execute to James H. Fiffe a bill of sale for certain slaves, described as in the preceding counts, he, the defendant, promised to pay to the plaintiff, on the execution by the latter of a bill of sale for these slaves to Fiffe, the further sum of \$475, that being the amount due and owing to the plaintiff by Lawson Thomas. The court then avers the execution of the bill of sale, and the delivery of the same with the slaves embraced by it as in the preceding counts—deduces thence the liability of the defendant, and his promise to pay, &c. To each of these counts the defendant demurred *severally*, and his demurrer being overruled, he pleaded—1. Non-assumpsit. 2. Want of consideration. 3. Failure of consideration. 4. The statute of frauds. On each of these pleas an issue was joined, and the cause submitted to a jury, who returned a verdict for the plaintiff, and judgment was rendered accordingly.

From a bill of exceptions sealed at the defendant's instance, it appears that defendant, as attorney for James H. Fiffe, held for collection certain notes made by Samuel Gantt, deceased, of whose estate the plaintiff and Sarah Gantt were administrator and administratrix; the aggregate amount of these notes was about \$2100. It was agreed by the plaintiff, upon the proposition of the defendant, that the former should settle the notes by selling to Fiffe the family of negroes described in the declaration. While the transaction was in the progress of consummation, the plaintiff objected to going on with it, stating that one Lawson Thomas, a free negro, who was the husband of the woman and father of the children about to be sold, owed him \$475, and he feared he would not be able to collect it of him, if he allowed his wife and children to go—that being the only hold on him. Lawson being present, admitted that he owed the plaintiff the sum stated. The defendant then said to the plaintiff that he had Lawson's effects in his hands, and if the bill of sale was executed, he would see the debt paid; plaintiff said that would not do, but defendant must say *he would* pay it. To which the defendant assented, adding, "I have the money in my pocket, and will pay as soon as you make the bill of sale." The plaintiff then executed the bill of sale, and handed it to

the defendant ; the defendant then receipted the notes, and left them on the table. Plaintiff then demanded the \$475, to which the defendant replied that he did not know so well about that—plaintiff then remarked that he could and would endeavor by law to make him pay, and the defendant answered that he could try it. After this conversation, and on the same day, the defendant took one of the slaves home with him, and on the next day the others were sent to him. In a deposition of the witness who narrated in open court the above facts, which had been previously taken, it was stated that at the time of the defendant's refusal to pay the \$475, all the papers were lying on the table ; and that she did not see, hear or know of any discharge or acquittance of Lawson from the payment thereof.

The slaves referred to belonged to the estate of the intestate, Samuel Gantt, of which the plaintiff and the witness were the representatives, as stated above. There was no evidence of their sale at auction, or under the authority of the orphans' court, though the plaintiff was to take them at their value, which had been returned to that court—was in possession of them and claimed them as his own.

There was no evidence that the defendant had any effects of Lawson in his hands, except as above stated. On the evening of the day on which the bill of sale was executed, the plaintiff sent to the person having charge of a tin box of Lawson's, which contained some notes and accounts of the latter, for the most part, if not entirely valueless, to inquire of Lawson's ability to pay, and Lawson procured the box and went off in the direction of the plaintiff's house.

After all the foregoing had taken place, the plaintiff spoke to Lawson about paying him some money—how much or on what account, witness could not state, and said to Lawson if he did not pay it he would kill him, or words to that effect.

The defendant acted in the purchase of the slaves as the attorney or agent of Fiffe, to whom the bill of sale was taken—and there was no evidence that he transcended his authority. A witness who stated that he was the agent and guardian of Lawson, testified that he did not know of any of the effects of Lawson having gone into the defendant's

hands, and if any had been received by him, he thinks he should have known it. The bill of sale recited as its consideration, the payment to the plaintiff of \$2073 by Fiffe, who purported to be the purchaser. There was no proof that any one interested in the slaves ever objected to the sale of them by the plaintiff, that Fiffe had ever been disturbed in the enjoyment of the property, or that he was dissatisfied with his title, or demanded a better one.

The court charged the jury as follows: 1. If Lawson owed the plaintiff \$475, and the defendant proposed to the plaintiff to purchase from him the family of negroes embraced by the bill of sale, and the condition upon which the latter acceded to the proposition was, that besides receipting for and delivering up the notes in favor of Fiffe, against the estate of Samuel Gantt, deceased, he (defendant) should pay him the sum of \$475, the amount of Lawson's indebtedness, and to this the defendant assented, and promised payment, upon the sale being consummated by the execution of a bill of sale; and thereupon the plaintiff, upon the faith of that promise, made and delivered such bill of sale, then the undertaking of the defendant was an original promise, and was not under the statute of frauds such a contract as should necessarily be in writing, in order to impart to it validity.

2. The defendant prayed the court to charge the jury, that if the negroes referred to, belonged to the intestate's estate, and the plaintiff was one of the administrators of that estate, then he had no right to take them at the appraised value, or to sell them otherwise than at a public sale; and a sale otherwise made by the plaintiff to Fiffe was illegal, and did not constitute a good consideration for the defendant's promise; and if no other consideration was shown, they should find for the defendant. This prayer was denied; and the jury were charged, that as between the parties to this suit, if the proof showed, that at the time of the sale the plaintiff was in possession of the slaves, claiming and treating them as his own, and sold them as such, the sale would constitute a good consideration for the defendant's promise.

3. The defendant also prayed the court to charge the jury, that if at the time of the sale, the slaves belonged to the estate of the intestate, the plaintiff had no right to sell them

at private sale to Fiffe, and if the promise of the defendant to pay the four hundred and seventy-five dollars was made in consideration of plaintiff's making such sale, or executing the bill of sale under the circumstances, then the consideration was not sufficient to support the promise. This prayer was denied.

4. The defendant further prayed the court to charge the jury, that if the defendant did promise to pay the \$475, yet to be binding on the defendant, the promise should be supported by a sufficient consideration moving to him; and that if the promise was verbal, it should appear that the original debtor was discharged, and there was a new consideration. This prayer was also denied.

5. The defendant then asked the court to charge the jury, that, if the promise to pay the \$475 dollars was to pay out of the effects which he had of Lawson, and it was shown that such effects were worthless, or insufficient, there could be no recovery against the defendant beyond the value of such effects. This charge was refused on the ground that it was abstract—there being no proof that the promise was thus qualified, but the evidence showed an undertaking to pay the full amount of the \$475, with an assertion that he had the money in his pocket, and would pay as soon as the bill of sale was executed.

6. The defendant also prayed the court to charge the jury, that he had the right any time before the consummation of the contract, to retract his promise as to the \$475, and if he did so before the delivery of the negroes, the plaintiff could not recover. This prayer was denied, and the jury were instructed that the defendant could have retracted previous to the consummation of the contract, but the contract was perfected by the execution and delivery of the bill of sale, and without a delivery of the slaves.

To the refusals to charge as prayed, and to the charges given, the defendant excepted, and now assigns for error the overruling of his demurrer to the declaration, and the rulings of the court, as shown by the bill of exceptions.

G. R. EVANS and W. HUNTER, for plaintiff in error, made the following points: 1. The several counts of the declara-

tion do not alledge a sufficient consideration to support the supposed promise of the defendant. 2. If the promise of the defendant was to pay in consideration of the sale of the negroes, and the execution of the bill of sale, the court should not have charged that the execution of the bill of sale entitled the plaintiff to recover. 3. The promise is within the statute of frauds; because it was not in writing, and supported by a consideration. [Nelson v. Boynton, 3 Metc. R. 396; McKenzie v. Jackson, 4 Ala. Rep. 230; Puckett v. Bates, Id. 390; Hester v. Wesson, 6 Id. 415; Brown v. Barnes, Id. 694.] 4. The sale of the property of the intestate by his administrator, at private sale, and without an order of court, is unauthorized, and passes no title to vendee. [Weir v Davis & Humphries, 4 Ala. 442; Dearman v Dearman, Id. 521; Clay's Dig. 223, § 13.] Such a sale is contrary to the statute, in violation of public policy, and a promise founded on it is void. [Story on Con. §§ 137, 139, 218, 220; Wheeler v. Russell, 17 Mass. 258, 281; Warren v. M. Ins. Co. 13 Pick. Rep. 518; White Franklin Bank, 22 Id. 181; Atlas Bank v. Nahant Bank, 3 Metc. Rep. 581; Williams v. Woodman, 8 Pick. Rep. 78; Carrington v. Caller, 2 Stew't Rep. 175; Black & Manning v. Oliver, 1 Ala. Rep. N. S. 449; O'Donnell v. Sweeny, 5 Id. 467.]

5. To take the case out of the statute of frauds, there should not only have been a consideration, but the original debtor should have been discharged. [Jackson v. Rayner, 12 Johns. Rep. 291; Simpson v. Patton, 4 Id. 222; Tillotson v. Nettleton, 6 Pick. Rep. 509; Watson v. Randall, 20 Wend. Rep. 201; Anderson v. Davis, 9 Verm. Rep. 136; Sinclair v. Richardson, 12 Ib. 33; Simpson v. Nance, 1 Spear's Rep. 4, Matson v. Wharam, 2 T. Rep. 80; Carlow v. Moss, 1 Bailey's Rep. 14; Rogers v. Collier, 2 Id. 581.] 6. The charge that was denied on the ground that it was abstract, should have been given—it affirmed the law correctly, and was warranted by the facts. [McKenzie v. Jackson, 4 Ala. Rep. 230.] 7. The defendant might have retracted his promise any time before the contract was consummated, and the proof shows that he did so. [Story on Con. § 83; Mactier v. Frith, 6 Wend. Rep. 103; Bruce & Bruce v. Pearson, 3 Johns. Rep. 534; Tuttle v. Love, 7 Johns. Rep. 470.]

G. W. GAYLE, for the defendant in error, made the following points: 1. The declaration is good. The law which governs a subsequent promise to pay the debt of a third person will be found in the following cases. The declaration conforms to it. [McKenzie v. Jackson, 4 Ala. 230; Hester v. Wesson, and Brown v. Barnes, 6 Ala. 415 and 694; Leonard v. Vredenburg, 8 J. R. 31, top page; Meech v. Smith, 7 Wend. 315, (analogous,) General Principle by Kent, 3 Kent, new ed. 122.] 2. The subsequent promise of Fambro was an original undertaking. 3. If the property sold to Fiffe, through Fambro his agent and attorney, belonged to the estate of Samuel Gantt, of which plaintiff below was administrator, Fambro having taken plaintiff's individual bill of sale for the same, regarded him as the owner, and never having returned the negroes, he is estopped from denying the ownership of Gantt, the vendor. See Shattuck v. Gregg, 23 Pick. 88; Smith v. Cudworth, 24 ib. 196; Beersley v. Hamilton, 15 ib. 40; Robertson v. Mansfield, 13 ib. 139; Riley v. Million, 4J. J. Marsh. 395; Hayle v. McCoy, 7 J. J. Marsh. 138; Riley v. Million, 1 Dana, 359; Bush v. Whitney, Washburn's (Ch.) Digest, 312, § 19; Worthington, et al. v. McRoberts, et al. 7 Ala. R. 814. 4. It was not necessary that the original debtor be discharged. This is only necessary where there is no new consideration. [Fairley v. May, 4 Cowan, 432; Cleveland v. Farley, 9 ib. 639; Rogers et al. v. Kneeland, 13 Wend. 115.] Where there is no new consideration, the original debtor should be discharged, (to take the case out of the statute,) in order to make it a case of harm to the promisee. 5. A delivery of the negroes not necessary to the consummation of the contract. The bill of sale was sufficient. [Starke v. Kenan's ex'rs, 6 Ala. Rep. 773.] If the promise is upon a new consideration, it is not necessary to be in writing. [15 Pick. 166; 27 Mass. Rep. 122; 7 Har. & J. 391; 5 Greenl. 81.]

COLLIER, C. J.—By the common law, an administrator was authorized to sell the personal estate of his intestate, when in his opinion the interest of those concerned, required it; and a purchaser from him, it is said, would only be held responsible when charged with notice of a *devastavit*. [Colt

v. Lanier, 9 Cow. R. 321; Brannan, et al. v. Oliver, 2 Stew. R. 47.] Our statutes, however, have materially modified the common law, and restricted the powers of the administrator in this respect.

The act of 1809, "concerning the duty of executors, administrators and guardians," &c. (Clay's Dig. 223, § 13), inhibits an administrator, &c. from taking any part of the estate represented by him at its appraised value, or from disposing of the same at private sale, except where the same is authorized by a will of the testator. "But in all cases where it may be necessary to sell the whole or any part of the personal estate of any testator or intestate, it shall be the duty of the executor, administrator or guardian, to apply to the orphans' court of their county, for an order of sale, and upon obtaining the same, to advertise the time and place of such sale, in three or more public places in their county, at least thirty days previous to the day of sale, and then and there proceed to sell the same, at public sale, to the highest bidder, giving at least six months' credit, the purchaser giving bond with approved security."

Under this statute, it was held by the supreme court of the United States, that a private and unauthorized sale by an administrator in chief, did not have the effect to defeat the right of a subsequent administrator *ad colligendum*. [Ventris v. Smith, 10 Pet. Rep. 161.] This decision is cited with approbation in Weir v. Davis and Humphries, 4 Ala. Rep. 442. In the latter case we held that a sale made otherwise than the law provided, was invalid, and that the property illegally sold, might be subjected to the claims of creditors, or the distributees of the estate.

In Dearman v. Dearman and Coffman, 4 Ala. Rep. 521, the validity of a private sale by an administrator was considered; and it was there said: "We will not inquire whether some portions of the act regulating the sale of the estates of deceased persons may not be directory merely, because here the sale (if indeed it can be called one) was without any order of court directing a sale to be made, and it was made *privately*. This the statute declares *unlawful*, and certainly no right can be derived from an unlawful act." "If then there had been

an actual sale made of the slaves in question to the plaintiff by the administratrix *privately*, and a full consideration paid, the title would not have passed as against the heirs, distributees or creditors." Under the influence of the same statute, it was decided in *Cable v. Martin*, 1 How. Rep. Miss. 558, and in *Baines v. McGee*, 1 S. & Mar. Rep. 208, that executors and administrators can only sell the property of the decedent in the mode prescribed by law; a *private sale* passes no title, and the vendee acquires no title to the property against the distributees. See also *Worten v. Howard*, 2 S. & Mar. Rep. 527; *Edmundson v. Roberts*, 2 How. Rep. Miss. 822; *White v. Beard*, 5 Ala. Rep. 94. As to the right of a purchaser under a void sale by an executor or administrator, to resist the payment of the purchase money, while he retains the uninterrupted possession of the property, see *Wiley & Gayle v. White & Lesley*, 3 Stew. & P. Rep. 355; *Planters' Bank v. Johnson*, 7 S. & Mar. Rep. 449. We do not deem it necessary in the case before us, to inquire what is the general rule upon this point; for the invalidity of the sale by the plaintiff to the defendant, is a palpable sequence from the fact that it was *private*, and *without an order of court*. The cases cited conclusively settle this point, and establish that the defendant acquired no title by his purchase, though the plaintiff himself may be estopped by his act from recovering the slaves in an action in his own name. [*Pistole v. Street*, 5 Porter's Rep. 64.]

If the sale was *unlawful*, because the statute so declared it, and passed no title to the vendee, it may be asked if it imposed a liability upon him to pay the purchase money? Certainly the plaintiff cannot coerce its payment, if, as was said in *Dearman v. Dearman and Coffman*, "no right can be derived from an unlawful act."

Even if it were not allowable for the defendant to prove the illegality of the consideration for his promise to pay the debt of *Lawson Thomas*, the plaintiff could not make out his case without proving it; for a promise without any consideration, would be a mere *nudum pactum*, which imposes no legal duty. And the consideration being *unlawful*, the promise which rests upon it, would be unsupported, and cannot be enforced.

The contract of the parties is opposed to public policy as declared by the statute, and to entitle the defendant to resist a recovery, it was not necessary that he should have returned the slaves to the plaintiff. In *Carrington v. Caller*, 2 Stewt. Rep. 175, 197, it was said, "that in relieving against a contract denounced by the policy of the law, the relief is not afforded with a view to favor the defendant, but to discourage contracts which restrain or oppose the policy of the law; therefore, those principles of justice, by the application of which individual rights are settled, are not permitted in such cases to have a controlling influence. In *Holman v. Johnson*, 1 Cowp. Rep. 341, Lord Mansfield says, that it is not in favor of the parties that the objection is ever allowed, but it is founded on the principle of public policy, *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an illegal or an immoral act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of the positive law of the country, there the court say he has no right to be assisted." After citing with approbation, *Mitchell v. Smith*, 4 Dallas' Rep. 269, in which the purchaser of land was permitted to avoid the payment of a promissory note given for the purchase money, though he was in possession, on the ground that the contract was against the legislation of Pennsylvania, it was added (in *Carrington v. Caller*,) "that the doctrine of *statu quo*, does not apply to a contract void in its inception for illegality, but only to one which, by some *post factum* circumstance becomes so; as if on a breach of contract by the vendor, the vendee elect to disaffirm, where it has been executed by him, either in the whole or in part, he must offer to place the vendor in *statu quo* before he can recover back the money he has paid." The view we have taken, most conclusively shows the illegality of the contract, and that the promise of which the plaintiff predicates the right to recover, is a mere nullity, and cannot be enforced. In refusing thus to rule, the county court misapprehended the law.

The objection to the declaration was directed mainly to the first count, and supposed it was bad, because it did not

alledge that the promise of the defendant was in writing. Although it may be necessary to prove on the trial that an undertaking to pay the debt of a third person was *in writing*, to relieve it from the influence of the statute of frauds, it is not necessary to alledge the fact specially in the declaration. [Kizer v. Lock, 9 Ala. R. 269.] In respect to the second and third counts, we think they substantially state a sufficient consideration, though to support the latter, it might be necessary to show, that Thomas was discharged, or that the promise was in writing. What has been said relieves us from the necessity of examining the other questions raised; and we have only to add, the judgment is reversed and the cause remanded.

WADDLE, ET AL. V. ISHE.

1. Where evidence is heard by a justice of the peace upon the merits in a suit before him for a trespass, but the cause is eventually dismissed by him for want of jurisdiction, this not being a decision upon the merits, is no bar to a subsequent suit for the same cause of action.

Writ of Error to the Circuit Court of Fayette.

TRESPASS for breaking the house and carrying off goods, by Ishe against Waddle, et al. The defendants pleaded not guilty, and a former acquittal of the same cause of action.

At the trial, the defendants produced the warrant and proceedings in a suit brought against them by Ishe before a justice of the peace purporting to be a suit for damages for breaking the house, &c. in which judgment was given against the plaintiff for costs. The justice of the peace was introduced as a witness and swore, although evidence was heard on the

merits, he dismissed the suit as having no jurisdiction over the same.

On this state of proof, the defendants asked the court to charge the jury, that if the justice heard evidence on the merits of the cause, and afterwards took time to consider of the judgment he should give, this was such a trial on the merits as would prevent a recovery in this action, although the justice dismissed the suit on the idea that he had no jurisdiction of it.

This was refused, and the defendants having excepted, now assign the refusal as error.

HUNTINGTON, for the plaintiff in error.

MARTIN, contra.

GOLDTHWAITE, J.—The utmost effect which can be claimed for the proceedings before the justice is, that *prima facie* the judgment pronounced by him would be considered as upon the merits. But its effect was entirely destroyed as soon as the further fact was disclosed that he dismissed the cause for the reason that his court was without jurisdiction. [Estell v. Tant, 2 Yerg. 467; N. E. Bank v. Lewis, 8 Pick. 113; Hughes v. Blake, 1 Mason, 519.]

Judgment affirmed.

THOMASON v. SCALES, ET AL.

1. The term "creditors," in the act of 1842, to prevent the sacrifice of real estate, does not mean creditors at large of the debtor, but such only as have ascertained the *bona fides* of their debts, by obtaining judgment.

Error to the Chancery Court of Talladega.

THE bill was filed by the plaintiffs, to redeem a tract of land described in the bill, under the act of 1842, which had been sold under execution, against one Nicholas Scales, and purchased by Thadeus Scales, the defendant in error.

The complainant claims to be a creditor of Nicholas Scales, as the owner, and holder of a note, made by him to Andrew B. Creswell, for \$120, dated the 4th October, 1844, and due the 1st January after; and alledges, that although the note was executed after the sale of the land, the debt evidenced by it existed previously, and was transferred to him in good faith, for a valuable consideration. That on the 19th February, 1845, being less than two years after the sale of the land under execution, complainant offered to redeem said land, and tendered to the purchaser the amount he had bid for the land, with ten per centum thereon, and agreed to credit the note he held against Nicholas Scales with the sum of \$25, being more than ten per cent. on the amount bid for the land, and tendered to him a deed of conveyance for the same, which he refused to accept or execute, alledging that he held claims on the said Nicholas Scales, and averred his willingness to credit the said Nicholas with a large amount, but did not produce any claim, or disclose its character, or amount, though required to do so.

The bill further charges, that the complainant was put in possession of the land by Thaddeus Scales, after his purchase, and that proceedings have been commenced by a grantee of T. Scales to oust him from the possession, &c. The prayer of the bill is, that he be allowed to redeem the land, for an injunction, &c.

The defendants answered the bill, but as the chancellor dismissed the bill for want of equity, considering that none but judgment creditors had the power to redeem under the statute, they need not be stated.

S. F. RICE, for the plaintiff in error.

1. The act "to prevent the sacrifice of real estate" is remedial, and should be liberally construed, so as to effectuate the plain intent of its enactment. The force of *technical*

terms must yield to the will of the legislature. [Wilkinson v. Leland, et al. 2 Peters R. 627 ; Iverson v. Shorter, 9 Ala. R. 713 ; 19 Viner's Ab. note, 515 ; note, 518 ; note, 519.]

2. The right to redeem is not by that act expressly confined to *judgment* creditors. Nor is the right of a *judgment* creditor placed by that act beyond a contestation. The right belongs to all *bona fide* creditors. And the *bona fides* of the demand must be a subject for contestation, on an application to chancery to redeem, whether the demand be reduced to judgment or not.

3. A note is, by our statute, made sufficient evidence of the debt, when the note is declared on—unless denied by a plea verified by affidavit. And a creditor holding a note is entitled to redeem, provided he can prove his demand to be *bona fide*—not simulated.

4. If the right to redeem is confined by construction to *judgment* creditors, then the estate of debtors will be sacrificed by the accumulation of costs in reducing *bona fide* demands to judgment.

L. E. PARSONS, contra.

1. In cases of fraudulent settlement, a *bona fide* creditor must be a judgment creditor. [Coleman v. Croker, 1 Vesey, Jr. 160 ; Read v. Livingston, 3 Johns. Ch. 481 ; Miller v. Thompson, 3 Porter, 196.]

2. "The creditor must obtain a judgment before he can redeem from another," who is a purchaser at sheriff's sale. [McGavock v. Woods, 10 Yerger, ; Wood, et al. v. Morgan, et al., 4 Humph. 374.]

3. The complainant does not appear to have been a creditor when this land was sold. The debt itself had not been created ; and it was not transferred to him until long after.

4. The deed presented for execution was not such as the statute requires. [Clay's Dig. 502, § 2.]

5. This bill is multifarious. The right to this conveyance and the *bona fides* of that which was made to Scales in trust for Mrs. Lovell, are entirely independent matters, separate and distinct. [McCartney, et al. v. King, Calhoun, et al., at this term.]

ORMOND, J.—The question to be determined in this case depends upon the true construction of the act of 1842, to prevent the sacrifice of real estate. [Clay's Dig. 502.] The first section provides, that the debtor whose interest in any real estate has been sold under execution, may redeem the land within two years from the sale, by a payment to the purchaser, or any one claiming under him, of the principal sum bid upon the land, together with *ten per centum per annum* thereon, with all lawful charges.

The second section gives the same right to other *bona fide* creditors, upon the same terms, "and shall further offer and agree to credit the person whose estate was sold, with the further sum of *ten per cent.*, or more, on the amount bid at execution sale, it shall be the duty of such purchaser to convey such interest, to such *bona fide* creditor, at their proper cost, unless such purchaser, shall pay, or secure to be paid, within six months thereafter, to such *bona fide* creditor the sum proposed to be advanced by him, on the bid at sheriff's, or execution sale. The third section gives the purchaser the right, if he is a *bona fide* creditor of the debtor, to credit the debtor with the sum proposed to be advanced on the bid, and keep the property; and the fourth section authorizes any other *bona fide* creditor of the debtor, to redeem on the same terms, from one who has previously redeemed the land, and so on of other creditors, *ad infinitum*.

The whole question in this case, is resolved into an inquiry of the meaning of the legislature, in the use of the term *bona fide creditor*.

The term *bona fide*, when applied to a purchaser, has a definite ascertained meaning, but when the same term is applied to a creditor, the sense in which it issued is not so clear, especially in the connection in which it is found. One may assert an unfounded claim against another, but in no just sense can he be termed a creditor. The term is the correlative of debtor, and can only be applied to one who has a just claim for money. It is therefore quite probable, that in prefixing the emphatic term *bona fide*, such an ascertained claim as the law presumes to be *bona fide*, was intended, because it is ascertained to be due, by the judgment of a court, after a contestation. It is but fair to presume it was not employ-

ed without meaning, and this was most probably what was passing in the legislative mind at the time of its enactment.

Independent, however, of the argument drawn from the peculiar phraseology of the statute, we think the term "creditors," was not intended to mean creditors at large of the debtor, but such only as have ascertained the *bona fides* of their debt, by obtaining a judgment upon it. This has been the construction placed on the word *creditors*, in analagous cases.

The statute of 1828, (Clay's Dig. 255, § 5,) making void certain unrecorded deeds, against creditors, and subsequent purchasers without notice, has been held to apply only to judgment creditors. [Ohio Life Ins. Co. v. Ledyard, 8 Ala. R. 873; Daniel v. Sorrelles, 9 Id. 439.] So it is a well established rule, of this and other courts, that a creditor at large cannot seek the aid of a court of chancery, to reach the equitable effects of his debtor, until he has established his claim by obtaining a judgment, and exhausted his legal remedy.

But in addition to these analogies, we think it quite clear, that the construction contended for, would in a great measure defeat the object the legislature had in view, and go very far to convert the statute into an engine of fraud.

The policy which dictated the enactment, was doubtless the prevention of the sacrifice of real estate. To accomplish this, each creditor is invited in succession, to bid for the land, and if sold beneath its value, it was supposed they would continue to bid, as a means of saving their debt, until the price approximated to the real value of the land, and if this could be accomplished, it would doubtless be a real benefit, conferred both on the debtor and his creditors. Now let us suppose a tract of land sold for less than its value under execution, and a creditor of the debtor demands from the purchaser the right to redeem under this statute. How is the purchaser to be satisfied, that he is entitled to redeem the lands? How is he to know that he is a creditor? Must he yield up his rights upon the mere declaration of the applicant that he is a creditor? And if not, by what proof is the fact to be ascertained? These are important and necessary questions to be answered, as he must either yield up his rights on

a mere demand of the applicant, or submit to such *extra* judicial proof as he may think proper to adduce, or by a refusal hazard the expense and trouble of a law suit, which may be greater than his interest in the land. It is impossible in our opinion, to suppose that the legislature calculated such consequences as these to flow from the right conferred on a creditor to redeem the land, and all these difficulties are overcome by requiring the proof afforded by a judgment against the debtor, the highest *prima facie* evidence of the fact, as it would be in most instances conclusive against the debtor himself. If record evidence of the debt is not required, then the presentment of an open account against the debtor, a contingent liability, as an indorsement, or a promissory note, which may be paid, or made for the occasion, would require the purchaser to yield his rights, or risk a law suit.

It is very important in this view, that the statute provides no mode of proof by which to ascertain whether one offering to redeem is in fact a creditor, thus raising the inference, that the demand exhibited as evidence of the fact, should prove itself. This inference is greatly strengthened from the fact, that the attention of the legislature was directed to the subject, as is evident from the fact, that they provided the mode for ascertaining the value of the "needful improvements" made by the purchaser, which the creditor was to pay, or secure, before he was permitted to redeem.

Again, the whole scheme of the act, presupposes, that the creditors will bid upon each other, until the worth of the land is obtained, and as a matter of course the creditor first applying to redeem, will have the *prior* right of redemption. But how could this process go on, if there were no means of determining at once the right of the creditor, as such, to redeem. If the fact that he was a creditor, may be ascertained afterwards, in a chancery suit instituted by him, to compel the purchaser to permit him to redeem, the two years allowed for redemption, would be exhausted in most cases during this litigation, and the result would be, that one of the two contending parties would get the land, to the exclusion of all the other creditors; and this generally at a grossly inadequate price. It cannot be doubted, that the effect of the law is to reduce the price of the land at the first sale, and this

necessary result could only be compensated by opening the first purchase, to the competition of successive bidders. This would be entirely prevented, if the argument insisted on is correct, and all the beneficial effects of the law annihilated.

It must also open a wide door to fraud and perjury. The purchaser may himself claim to be a creditor of the person whose land has been sold, and by crediting his debtor with the amount of the redemption money offered, deprive the party offering to redeem of his right to do so. If any thing short of record evidence of the debt is sufficient, he has only to assert a claim against the original owner, to extinguish the offer to redeem, and may collude with the former owner to keep off all the creditors. So also the former owner may collude with another person, and by simulating indebtedness deprive the purchaser of his right, and hold the land against the *bona fide* creditors.

It is no answer to this argument, that these pretended claims could be exposed by a resort to the tribunals of the country. Possibly in some cases this might be done, but it is manifest the legislature intended no such costly and dilatory process; but designed a plain and simple proceeding, which could be worked out by the people themselves, nothing more being required, after the fact that one offering to redeem was a creditor, was ascertained, but a simple computation; and as to the only matter about which it was supposed a difficulty could arise, care was taken to provide the mode of adjusting it.

These considerations lead us to the conclusion, that the creditors spoken of in the statute, are judgment creditors, and that no others are entitled to its privileges. We have been referred to the cases of McGavock v. Woods, 10 Yerger, and Wood v. Morgan, 4 Humph. 374, where it is said, the same point has been thus decided, upon a statute similar to ours, but we have not been able to get access to these books, or we should have fortified our judgment by a reference to them.

Let the decree of the chancellor be affirmed.

BURNS AND RANDLE v. MINTER.

1. When a school commissioner has drawn school funds from the bank, which he fails to pay over as directed by law, any legal voters of the township may maintain an action against him for the recovery of the money, by motion under the statute.
2. When the school commissioners neglect to employ teachers, and refuse to appropriate money in their hands for the tuition of the children of the township, if the children of the township do attend other schools, within its limits, the tuition money may be recovered from them, or any one of them, by any legal voter, for the purpose of defraying such tuition.
3. Such a judgment could be rendered in the name of the plaintiff, for the aggregate sum, ascertaining the several sums due each child, or parent, to be satisfied by the payment of these several amounts, to the persons respectively entitled.
4. One commissioner, as such, cannot recover from another commissioner, money belonging to the school fund in his hands.

Writ of Error to the Circuit Court of Dallas.

UPON a suggestion to the orphans' court of Dallas, by the plaintiffs, two of the legal voters of township 17, in range 12, situated in that county, that the defendant, a commissioner of the same township, had collected funds belonging to the township which he had failed to pay over, it was ordered, on motion of the plaintiffs, that a citation issue requiring the defendant to appear before the court on the second Monday in July next thereafter, (1844,) to show cause why a judgment should not be rendered against him for the amount of money collected by him, and which he neglected and refused to pay over, together with twenty per cent. damages for its detention.

The facts, so far as material, may be thus condensed: The defendant, as a commissioner of the sixteenth section, received at one time of the Branch of the Bank of the State of Alabama at Montgomery, the sum of \$203 25, and at another time the sum of \$282 82. Defendant was afterwards requested by some of the inhabitants of the township to pay over the money he had thus received for the use of the schools

therein. The plaintiffs also demanded it of him to be applied to the same use. The plaintiffs are commissioners of the sixteenth section, and inhabitants and legal voters within the same.

It was shown that there were about forty children in the township, who were entitled to the benefit of the school funds; that ever since the receipt of the money by the defendant, there had been schools in the township, the teachers of which were paid by the inhabitants of the same—the defendant refusing to pay anything from the funds in his hands.

The plaintiffs themselves have children who are entitled to the benefit of the township funds. Long after this proceeding was instituted, on the day previous to the trial, a treasurer of the township was appointed; and thereupon the plaintiffs modified their motion so as to pray judgment in favor of such treasurer, or other person or corporation as might be entitled to recover.

It was proved that all the teachers but one who had been employed since the receipt of the money by the defendant, (that is, from 1840 to 1844), had received certificates of qualification, with one exception. The motion for judgment was overruled, and the proceeding dismissed. Upon appeal to the circuit court, the judgment of the orphans' court was affirmed; and the cause now comes here for revision on the judgment of affirmance.

FELLOWS and EVANS, for the plaintiffs in error, cited *Connell v. Woodward*, 5 How. Rep. (Miss.) 665; Clay's Dig. 522, § 13; 523, § 14, 15; 527, § 35; 528, § 41; 529, § 45, 46, 47, 48.

G. W. GAYLE, for the defendants in error, relied upon the reasoning of the judge of the orphans' court contained in his opinion sent up with the transcript, and made no additional argument.

COLLIER, C. J.—The act of 1837, "to revise and amend the laws in relation to schools and school lands," (Clay's Dig. 526, § 24) directs that the commissioners of the several six-

teenth sections which may be sold, shall pay into the State Bank or a branch thereof, all the moneys which they then had or might thereafter receive, belonging to their respective sections, &c.; and the officers of the bank shall open an account current on the books thereof, with such commissioners, for all money, &c., and the same shall bear interest, payable quarter-yearly, &c., which interest shall be paid to the commissioners on demand, and applied by them solely to the use of schools in the township which they represent."

The same statute authorizes the commissioners to appoint and discharge at pleasure, a clerk and treasurer, and requires the treasurer to enter into bond with surety, conditioned for the performance of his duties, and to account for and pay over according to law, and the regulations and orders of the commissioners, &c., all moneys which he shall receive under his appointment. It is made the duty of the treasurer to receive all moneys which may become due for rents, or may be in any other way accruing to the school fund of the township or any district therein, &c. [Clay's Dig. 522, § 13.]

It is further provided, that the commissioners shall apportion the funds in hand among the several school districts in the township, in proportion to the number of pupils in each school for the preceding year. The trustees of each school district, or where the township supports but one school, the commissioners shall have power to employ teachers or a teacher, on such terms as they may deem expedient; but no teacher is to be employed until he shall have been examined by the commissioners, and obtained their certificate of his qualifications and good character. [Clay's Dig. 523, § 14, 15.]

If there is no school in a township, or not scholars enough to constitute a school therein, or where it shall be more convenient to send to school in an adjoining township, it shall be the duty of the commissioners to apply the interest arising from the sale, &c., to the education of the scholars of such township in equal proportion, "at any other school not situated in such township, which shall be paid to the parent or guardian, upon the certificate of the teacher of such child or children." [Clay's Dig. 527, § 35, 41.]

The act of 1843, "to compel commissioners of sixteenth

sections to pay over funds received by them, and for other purposes," (Clay's Dig. 529, § 45, 46, 47, 48,) enacts that where commissioners of sixteenth sections have failed to establish schools in their respective townships as now required by law, it shall be their duty to pay over all such interest as may have accrued, until such schools shall be established, to the children of the township who have attended any other school in the township, in the same manner as is now provided by law for children going to established schools under their direction. *Further*, when a commissioner or commissioners shall have drawn from bank any funds belonging to his or their township, and shall fail to pay over the same with legal interest from the time it was received, "on motion of any legal voter of the township where the funds have or may hereafter be withheld in the regular orphans' court of his county, it shall be the duty of the judge to issue a citation forthwith, requiring said commissioner or commissioners to appear *instantly*, and show cause why judgment should not be entered against him or them and their securities, for said default. Upon the return of said citation, the judge of said court shall proceed to hear and determine the same, and give judgment as the equity of the case may appear." *Again*: "Should the judge be of opinion the commissioner or commissioners have failed or refused to comply with the law, he shall proceed to give judgment against the same, and his or their securities, with twenty per cent. as damages."

The motion in the present case is not a proceeding at the instance of two of the commissioners against the third. If such were its character, it could not be supported; for the act does not authorize a majority of the board to proceed summarily or otherwise against the minority to recover the school funds of the township, which the latter may have received. The motion is made by the plaintiffs, not as commissioners, but as "legal voters of the township," upon the allegation that the defendant, as a commissioner, has drawn from bank funds belonging to the township, which he has failed to pay over as directed by law. In this view, if the plaintiffs are legal voters, which the evidence abundantly shows, we can see no objection to their right to make the

motion ; and the question is, whether the facts entitle them to judgment.

Whether the acts of 1837 and 1840, so far as they direct the payment of interest arising from the sale of sixteenth sections, or money arising from the rent of them, to be paid to the parents or guardians of children who are sent to school out of their townships, where no school is taught within the same, may not operate with the statute of 1843, is a question which need not now be considered. But however this may be, we think it is not necessary in any other case to furnish a certificate of the teacher, to entitle the scholar to his proportion of the school fund.

The 45th section of the act of 1843, we have seen, makes it the duty of the commissioners, where they have failed to establish schools in the township, to pay over the interest which accrued on the school fund, "to the children of their township, who have actually attended any other school in said township, in the same manner, and under the same rules as are now provided by law, for children going to established schools under their direction." To entitle the children of the township who have attended a school within the same independent of the control of the commissioners, the law does not require that the teacher should have obtained from the commissioners a certificate of qualification, or that the teacher should furnish a certificate of attendance on his school. The statute makes no such requisition, and we know of no warrant for its interpolation. The proof shows, that the children of the township did attend schools within its limits, other than those established by the commissioners—in fact, that the defendant and his associates employed no teachers, and he refused to appropriate any thing for the tuition of these children, though requested to do so. This is quite sufficient to fix his default ; and he cannot excuse himself by showing the funds had not been apportioned among the districts, or that the commissioners had failed to employ teachers, for this would be to make one omission of duty a justification for another, which cannot be tolerated.

It was supposed by the orphans' court, that as the plaintiffs were joint commissioners with the defendant, they were not entitled to recover, and that as the treasurer was appoint-

ed subsequently to the institution of this proceeding, no judgment could be rendered in his favor. This view proceeded from a misapprehension of the facts. The motion was not made by the plaintiffs as commissioners, but as *legal voters*, as we have already said; and it is satisfactorily shown by the proof, that they come within this category.

There can be no objection to the competency of the legislature to authorize a *legal voter* to move against a defaulting commissioner, and recover a judgment in his own name, and the only question upon this branch of the case is, what have the legislature done? The 47th section directs the judge, upon the return of the citation, to hear and determine the motion, and give judgment as the equity of the case may demand; and the next section authorizes a judgment to be rendered to the extent of the default, with twenty per cent. damages. To the latter section there is a proviso as follows, viz: "Either party shall have the right to appeal to the circuit court, in accordance with the law now regulating appeals."

Whether a judgment in favor of the voter, submitting the motion without any notice of the person to whose use the funds should have been appropriated, would be regular, we will not now stop to consider. But we can discover no objection to rendering a judgment in his name for an aggregate sum, ascertaining the several sums due each child or parent, and ordering the judgment to be satisfied by the payment of these several amounts to the parties respectively entitled. Such a judgment would be consonant to equity, and so far retain its unity as to authorize its revision upon an appeal to the circuit court, or a writ of error from that court, to which the plaintiff and defendant in the motion were the only parties, while at the same time it would secure to the parties entitled, their dues, without the necessity of looking to the plaintiff for payment.

The error in the ruling of the circuit court is sufficiently shown by what has been said—its judgment is consequently reversed and the cause remanded, that it may be thence sent to the orphans' court for its further action.

JOHNSON AND WIFE, ET AL. V. COLLINS.

1. The right to enter land, under the pre-emption laws of congress, descends to the heir at law, if the occupant dies without performing the conditions imposed by these acts, and obtaining the title. The heir cannot call on the administrator to pay the purchase money to the government out of the assets of the estate, nor the widow to perfect her title to dower. Therefore, where, in such a case, the administrator paid the purchase money due the government, out of the assets of the estate, and took the title to the widow and heirs of the deceased, as tenants in common—held, that an order obtained by the administrator from the orphans' court, for the sale of the land, upon the representation that the estate of his intestate was insolvent, was void, and that the purchaser at the sale obtained no title to the land. That no trust upon the land resulted to the administrator, or the creditors of the estate, from the fact that the administrator paid the purchase money out of the assets of the estate. Whether, the administrator might enter upon, and sell the mere occupancy of the deceased—*quere.*
2. A penal bond, made by the widow, jointly with the administrator, to make the purchaser a good title to the land, estops her from asserting title against him, under the title derived from the patent from the government.

Writ of Error to the Court of Chancery for the 4th District.

THE case made by the pleadings and proof may be thus stated: The bill asserts, that Peter Martin, deceased, in the year 1833, occupied and cultivated the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of S. 26, T. 18, R. 4, East, in Marengo county, and resided on it on the 19th June, 1834, so as to bring himself within the provisions of the pre-emption act approved on that day, reviving the act of the 29th May, 1830; that before complying with the requisitions of the laws, and paying the minimum price, \$1 25 per acre, he died, leaving surviving him his widow, (now the wife of the said Malaleel Johnson, and children, (plaintiffs in error,) in possession of the land; that James Martin, (also a defendant to the bill,) shortly after be-

came administrator of Peter's estate, and paid out of said estate into the land office at Demopolis, the price, \$1 25 per acre, and purchased said land in the names of said widow and heirs of Peter Martin, taking the receiver's certificate of payment to them as purchasers; that this purchase was made, and the certificate obtained "in favor of the widow and heirs, upon proof of the fact, and by virtue of the right which had before that time accrued to said Peter in his life-time;" payment being made out of the assets of the estate; and that shortly after, the said James Martin, administrator, &c. offered to sell said land to complainant, Collins, at \$20 per acre, to which offer said Collins assented, provided a good title in fee simple could be secured to him; that James Martin assured him that such title could be made by obtaining a decree of the orphans' court for the sale of the land; that he, said James, agreed with Collins to institute proceedings for that purpose forthwith; that said James and Sarah Martin, (widow of Peter Martin, and now Sarah Johnson,) on the 2d day of February, 1836, agreed with complainant, that if he would pay \$800 in cash for said land, (being half of the whole price of the land at \$20 per acre,) and \$800 more when the title and conveyance to him should be completed, they would become bound to him in a penal bond, that the title should be made to him; that accordingly, on that day, they did make and deliver to him their title bond to that effect, in the penalty of \$3200, (which bond is appended as an exhibit to the bill;) that he, Collins, had ever since had possession of said land; that James Martin, as administrator, &c. did cause proceedings to be had in said orphans' court, to procure a sale of said land, on the ground that "it could not be equally, fairly and beneficially divided among the heirs of said Peter;" that a decree was made and a sale had accordingly, by commissioners appointed by said court, (a transcript of the proceedings in which is set forth and filed with the bill;) that at the sale, James Martin, was the purchaser, at a less price than \$1600, and thereupon conveyed the land, in compliance with his bond, to said Collins, and received the other \$800, to wit, on the 20th February, 1839; that said James Martin applied the whole \$1600 received by him from complainant, and which was as much as the land was worth,

to the payment of the debts for which, as administrator, he was liable; that Peter Martin's estate was insolvent, and so reported and declared, and that his creditors received the whole benefit of that payment by complainant for the land.

Collins then further complains, that notwithstanding the premises, the plaintiffs in error, to wit, the widow and children of Peter Martin, and Johnson, the present husband of the widow, have sued him at law, in an action of trespass to try titles to the land, and he prays for *subpœnas* and an injunction.

Appended to the bill as exhibits are—1, A copy of the title bond from James and Sarah Martin to Collins, describing a piece of land, not by any numbers, but as lying in the French grant, and as bounded, north by the lands of Manning, east by the lands of William T. Hoskins, south by the lands of John Collins, and west by the lands of Wm. B. Duval, and binding the obligors to make good and lawful title, free from all incumbrances, within a reasonable time.

2. A transcript of the record of the orphans' court, showing that James Martin, as administrator of Peter Martin, filed his petition, describing by numbers, &c. the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of S. 26, T. 18, R. 4, East, and the cultivation and residence of Peter Martin, thereon, and reciting that before the expiration of the two years, within which, according to the pre-emption law, he might have purchased said land as pre-emptor, he died, and the land was afterwards proved out by Sarah Martin, the widow, and entered by her and the heirs of Peter Martin, as tenants in common; she having paid for it with her money, and that of the heirs; and that said land belonged to the estate of Peter Martin, and could not be equally, fairly, and beneficially divided; wherefore petitioner prays that a day may be set for the hearing of said cause, and a guardian *ad litem* be appointed for the heirs, who are minors. A guardian *ad litem* is appointed, without notice, so far as appears by this record, to any of the children, and a decree to sell, and a sale made by commissioners appointed by the court, to James Martin, upon his giving his notes to the commissioners for \$1360, the amount bid by him, which sale was afterwards confirmed by the court, and a conveyance made according to its order; the notes afterwards delivered

by order of the court, to him, as administrator, upon his giving bond and security according to law.

The answer of John Wesley Martin admits and says, that his "father, Peter Martin, as alledged, cultivated and resided on the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of S. 26, T. 18, R. 4, East; and that upon making proof thereof to the satisfaction of the register and receiver of public moneys at the land office of the United States at Demopolis, and paying for said land \$1 25 per acre, to said receiver, the said Peter would probably have been permitted to enter and purchase said land." That without having done so he died, leaving said Sarah, his widow, and six children, of whom respondent was one, surviving him; that one of said children several years ago died, an infant and intestate, leaving his brothers and sisters his only heirs at law, all of whom are parties to this suit; that said widow and children of Peter Martin, resided with him on said land, and aided him in the cultivation thereof; that said land lay in the French grant, and had never been offered by the government at public sale, and therefore was not otherwise purchasable of it, than under and by virtue of the pre-emption laws, that the government granted the land to the widow and children of the said Peter, in consequence of his and their cultivation and residence upon it; shows the patent of the government to them by name, (describing them as the widow and heirs of said Peter,) as tenants in common, and not as joint tenants; admits that James Martin, administrator of Peter, advanced the price of said land (\$100) out of the estate which was of said Peter, and paid it to the receiver; denies that the estate was insolvent, and says on the contrary, that it was more than sufficient by \$8,000 or \$9,000 to pay all the debts and funeral expenses of said Peter—a surplus sufficient to have supported the family and educated the children, who are all minors, and some of them of tender years; says that the estate has been squandered and wasted by the administrator, and perhaps other persons; that the land needed not to have been sold to pay the debts, (and therefore the sale was not petitioned for on that account,) or to maintain the children; and that after the estate had been grossly mismanaged and wasted by James Martin, the administrator, during several years, a subsequent administrator *de bonis non*

reported the estate insolvent, (respecting of course the property only that had come to his hands.) Further answering, this respondent says, that he was first informed by the bill of complaint, of the bargaining between Collins and James Martin, and of the making by the latter and Sarah Johnson, (formerly called Sarah Martin,) of the title bond to said Collins. He admits them however, and also the payment of the \$1600 by Collins to James Martin, and the proceedings in the orphans' court, (of which neither he nor the other children, although some of them were more than fourteen years old, had any notice,) and the sale under the decree and conveyance by James Martin to Collins, by a deed covenanting to warrant and defend the title; but he insists that the orphans' court had no jurisdiction over the land, as estate which had belonged to Peter Martin, and that all the proceedings therein in respect to said lands, were *coram non judice*, and void. He says moreover, that having for several years resided in the city of Mobile, he has no knowledge of any settlement of his administration by James Martin; but has been informed, and therefore admits, that in an account in respect to said estate, filed in said orphans' court by James Martin, he charged himself with the said \$1600. But respondent denies that such money either necessarily was, or ought to have been applied towards payments of debts due from said estate. And finally says, that soon after he attained the age of twenty-one years, he joined in the suit to recover the land, which is sought to be enjoined, &c. Prays also the benefit of a demurrer and plea.

The answer of Malaleel Johnson and wife, formerly Sarah Martin, is of the same effect with that of John W. Martin;—the said Sarah saying that she did not know, at the time the suit at law for the land was brought, that she had ever signed the title bond; says, as James Martin, a brother of her deceased husband, was administering the estate, and she had confidence in him, she was in the habit of signing any papers he requested her to sign, and supposes she signed the bond under those circumstances without knowing what it was; asserts that the estate was not only solvent, but solvent by from \$6000 to \$9000, as she knows from her own knowledge, and also by information from James Martin as administrator, &c.

The answer of J. W. Martin, as guardian *ad litem* for the minor defendants, denies all matters alledged in the bill in favor of Collins—and insists by way of a plea, that the orphans' court had no jurisdiction over the land, as a part of the estate of Peter Martin, and that the proceedings therein were *coram non judice*, and void, &c.

The cross bill of John W. Martin, and the other children of Peter Martin, alleges the same facts that are set forth in J. W. Martin's answer in respect to the W. half of the N. W. quarter of section 26, T. 18, R. 4, east, and of the cultivation and residence thereon, and that after the death of Peter Martin, it was granted by the United States to them and their mother, the widow of Peter Martin, as "tenants in common and not as joint tenants;" that it had been a long time in the possession and use of John Collins; that they sued him for it at law; that he thereupon filed his bill in chancery to enjoin from proceeding in said suit, setting forth the bargaining between him and James Martin in respect thereto, and the title bond made by the latter and their mother, the said Sarah Martin, and the proceedings in the orphans' court, and sale under its order, &c.; that until the filing of said bill, the complainants in the cross-bill had no knowledge, and had never heard of the making of said title bond: and that although, as they are advised, the proceedings in the orphans' court (having been *coram non judice*) are void, yet they cast a cloud about the title, and may make the land less valuable to them, &c.

Wherefore these complainants pray that these proceedings and the sale made, or attempted to be made, by virtue thereof, may be declared void, &c., and the said Collins to be ordered to deliver up to be cancelled, &c. his deed, and also that if it shall be found that said Sarah Martin, by the title bond aforesaid, or otherwise, has divested herself of the title acquired from the United States, and transferred it to Collins, or otherwise impaired the same, so that the action of trespass to try titles cannot be prosecuted, then the chancellor would decree a partition of said land, so that six-sevenths should be set apart, and possession thereof be delivered to these complainants.

And further, that Collins be required to account to them for rents and profits, &c. and for general relief.

Collins, in his answer to the cross-bill, re-asserts, so far as pertinent, the matters alledged by him in the original bill—and says in addition, that Peter Martin, in his life-time, appeared before the officers of the land-office at Demopolis, and asserted his right to enter said land, as pre-emptor, and offered to make proof thereof, and payment; that his claim “was not then allowed, or rather was held under advisement,” until said officers should be instructed from Washington, whether the lands in the “French grant” were subject to entry and purchase under the pre-emption laws; that he died before such instructions came; that after the receipt of them, James Martin, as administrator, purchased and paid for said tract of land as aforesaid; and that a part (does not say how much) of the \$1600 paid by Collins for the land, was laid out by James Martin of the purchase of the parcel of land in the names of the widow and children, whereon they now reside, &c.

It is ordered that James Martin be made defendant to the cross bill.

The evidence consists of—

1. The patent which grants the land to the widow and heirs (mentioning their names) of Peter Martin, and their *heirs*, as “tenants in common.”

2. The deed from the commissioners appointed by the orphans’ court, to James Martin, conveys “all the right, title, interest, claim and demand, which was of the estate of said Peter Martin, or after his death, descended to his heirs, and which the said commissioners, by virtue and authority of the power by the said order and decree in them vested, may and can convey,” &c.

3. The deed from James Martin to Collins, conveys the land, with a *covenant to warrant and defend the title against all persons whatsoever*. From all liability under this deed and covenant, and on account of the land, Collins released James Martin.

4. James Martin (a witness for Collins) testifies as to the cultivation and residence of Peter Martin on the land; that he left it with his family about the 1st of December, 1834, .

and died 3d of February, 1835: that deponent, as administrator of Peter Martin, in the spring of 1835, proved the residence and cultivation of the latter, according to the provisions of the act of 19th of June, 1834, and with moneys raised out of the assets of the estate (\$100) paid the land out of the land office in the names (as that was deemed most properly to express the real condition of the title) of the widow and heirs of Peter Martin; that deponent considered the land a part of the estate of Peter Martin, and it was so treated by him and the "family,"—and that so considering it, he sold it to Collins, (as the tract was too small to be divided among the children) at \$20 per acre, or \$1600 for the tract, on the 2d February, 1836; and Sarah, the widow, signed with deponent the contract. Deponent charged himself as administrator, with the whole amount of sixteen hundred dollars, because that was the sum for which he and said Sarah had previously agreed to sell the land to Collins, although he had bid for it at the commissioners' sale only \$1100: and applied \$1000 of the \$1600 toward payment of Peter Martin's debts; and the residue, \$600, to the purchase of a house and parcel of land, the conveyance of which (this testimony is excepted to as not competent) was made to the widow and children, who now reside on the land. [This evidence was excepted to because witness was interested, and a party to the suit—and that part which respects the purchase of other land, with \$600 of the \$1600, or rather the proof of the conveyance of it, as alledged, by *oral testimony*, was excepted to as incompetent.]

In reply to the cross-interrogatories, witness identifies the children, proves that they were all minors: that the oldest became 21 years old in 1842: that another one, Albert, died childless in 1836 or 1837: that Peter Martin, at the time of his death, was not living on the piece of land in controversy, but had moved away from it; that this land lies in the "cane-brake," and was not otherwise purchasable than by virtue of the pre-emption laws;—mentions the property of the estate, and that some was sold to pay debts of Peter Martin, and some transferred to the succeeding administrator *de bonis non*: says he cannot tell what was the amount of debt due

from Peter Martin at the time of his death ; that deponent did not report the estate insolvent. "Another administrator having been appointed to act in his place:" that the assets of the estate "were not sufficient to pay the debts"—and after all the assets were applied in payment of the debts, there were still debts remaining unpaid.

On a re-examination upon cross-interrogatories, inquiring whether the insolvency of Peter Martin's estate was an insufficiency to pay the debts contracted by Peter Martin himself, or debts wastefully contracted afterwards, this witness says, he is under the impression that if the property had been sold soon after the death of Peter Martin, there would have been enough to pay the debts of the estate—but the fall of the negro property made the estate entirely insufficient ; and he says in reply to the questions on behalf of Collins, that Peter Martin, in his life-time, claimed this land under the pre-emption law ; that witness does not know that he ever offered to purchase the land at the land-office, and that Collins was to give him (witness) \$1600 for the land, "if I (the witness) could have a sale made by order of the court."

Upon the third examination upon cross-interrogatories, this witness admits that the insolvency of Peter Martin's estate was not created by debts or liabilities contracted by himself, and those for funeral expenses, &c., that a large portion (answer to cross-interrogatory 4th) of the estate was expended in common store accounts, contracted after said Peter's death, and not necessary, or contracted for the preservation or security of the property of the estate: that although he thought said Peter's debts exceeded \$5000, he did not think they exceeded \$6000 or \$7000 ; that deponent charged himself with the correct amount of the assets in the account which he filed in the orphans' court, as administrator of the estate, and that he did not think the assets, exclusive of the \$1600, exceeded \$8000.

5. The testimony of Woolf, the clerk, shows that the amount of assets with which James Martin charged himself, in the account referred to, was \$12,816 07: also that the subsequent administrator *de bonis non*, had reported the estate insolvent.

6. The deposition of A. J. Crawford proves that he was

register of the land-office in Demopolis in 1834, and the proper officer to hear applications for the benefit of the pre-emption laws: that in the fall of that year, Peter Martin applied for leave to enter the W. half of the N. W. quarter of section 26, t. 18, r. 4, East, under the pre-emption act of the 19th June, 1834, and insisted with much importunity on his right to do so, offering to make proof of his cultivation and residence, and to pay the *minimum* price; that deponent refused to allow his claim, because he did not believe the lands in the "French grant" (where this piece lay) were subject to the pre-emption law, and would wait to know what decision upon this point should be made at the land-office department at Washington; that at the suggestion of deponent, said Peter suspended any further action in the matter until instructions upon this point should be received from Washington—and went away intending to return and renew his application, whenever it would be allowed; that said Peter did not actually deposit in the office, or tender, or show, the money, but deponent has no doubt he was able and ready to do so: that Peter Martin died 5th February, 1845: and the instruction to allow pre-emption privileges in the "French grant," arrived from Washington about the 1st April afterwards;—that soon after, the widow of Peter Martin, and James Martin, the administrator, came to the land-office, proved out said land under the pre-emption law, paid for it, and took the certificate of purchase to the "widow and children," because said Peter having died, it could not issue to any other person than them; that the claim of pre-emption was not allowed on account of any thing done by them, but because of the cultivation and residence of Peter Martin himself; which cultivation and residence were required to have been done and had, before the date of the law, (19th of June, 1834), and that the land in question was not otherwise purchasable, than by virtue of the pre-emption law, because it lay in the "French grant," and had never been offered at public sale by the government.

In another deposition, this witness (Crawford) says he knew Peter Martin well, and "he was not insolvent." (McCarty, receiver, proves no papers on file in the land office, relating to this claim.)

7. Sarah Johnson's deposition (to be used in the cross-suit only) proves the identity and ages of the children of Peter Martin; that deponent was his widow; that the estate was not insolvent at Peter Martin's death; and that she and her husband are parties to the original, but not to the cross-suit.

The other depositions relate to the value of the land, its rent, &c., and were intended to be used in case a reference had been made to the master, or a decree to account. Taliaferro proves that the land being all cleared, is less valuable than if half were wooded.

The chancellor considering justice to be on the side of Collins, and "the law to be questionable," perpetually enjoined further proceeding in the suit at law, and required the patent to be delivered to Collins.

This decree is now assigned as error.

A. R. MANNING, for plaintiff in error, insisted—

1. The orphans' court had no power to order a sale. [Wyman, et al. v. Campbell, et al. 6 Porter, 219; Clay's Dig. 224, § 16.]

2. The pre-emption act of 19th June, 1834, granted a privilege only, and the courts could not interfere in favor of an occupant, or settler. It was an act of bounty. [Wilcox v. Jackson, 13 Peters, 498; Rhea, Conner & Co. v. Hughes, 1 Ala. R. 220; McElyea v. Hayter 2 Porter, 152; Belle, et al. v. Payne, et al. 2 Stew. 413; Minter v. Crommelin, 9 Ala. R. 594; Wright v. Mullens, 2 S. & P. 221.] If the intestate, at his death, could not be compelled to take the land, his heirs (and of course creditors) cannot insist on paying for it with the funds of the estate. [Broome v. Monck, 10 Ves. 606, and cases there cited.]

3. There could be no resulting trust in favor of the creditors, any more than if they were aliens, or than it could be presumed in favor of a father. Besides the money with which the land was bought was the money of the wife and children, in the hands of the administrator, as trustee for them.

4. A *resulting trust* is not within the jurisdiction of an orphans' court. [Elliott v. Mayfield, 3 Ala. R. 231.] For the *existence* of the trust, (not its value,) would have to be first established.

5. Collins is not entitled to a decree. He must look to his covenants with James Martin for indemnification. [Cullum v. Br. Bank at Mobile, 4 Ala. 13.]

6. The proof about the purchase of other land, and the conveyance to the widow and children is not competent. And the money with which it was bought, belonging, after his contract with Collins, to James Martin, he had a right to pay it over to the creditors, or distributees of Peter Martin's estate, (the assets of which he had wasted,) or to any other of his creditors.

7. The *bill* does not alledge that Peter Martin intended to become a pre-emptor, or the pretended purchaser of other lands for the widow and children.

8. The release of James Martin precludes Collins from a decree against the other defendants to his bill. [Thompson v. Harrison, et al. 1 Cox's C. C. 344.]

JOHN T. LOMAX, for defendants in error, insisted—James Martin is a competent witness for Collins. No relief is prayed against him. No decree in the case could affect him. His only interest was in the warranty to Collins, and from which he was released. His interest, if any, is adverse to Collins. He is still liable to the heirs on his bond in the orphans' court, for application of the fund arising from the sale of the land. [Johnson v. Cunningham, 1 Ala. R. 249.]

As to the application of the money to the purchase of land for the children, he can speak without the deed taken to them. Nothing evidenced by the deed is in issue. It is a collateral fact. [Smith v. Armistead, 7 Ala. R. 698, and cases cited.] He speaks as to the fact of payment only, which the deed would only corroborate, as would a receipt. [Johnson v. Cunningham, *supra*.]

When Peter Martin had complied with the conditions of the act of congress, he asked not a privilege, but was entitled as a right to a patent from government. And had his right in this respect been violated, even by the act of government, his petition would have afforded effectual redress. But the question was not with the government, but with its officers, whom Martin could have reached by mandamus.

Though it was optional with Martin to have perfected his

title, he had signified his intent to do so, and made tender of the money, and his administrator but carried out and completed the act. [Earl of Radnor v. Shafto, 11 Vesey, 448.]

Martin considered this land as constituting part of his estate, and may have obtained credit upon the faith of it. The government recognized his estate in the land as descendible, and the patent was issued accordingly. The heirs claimed the land in their representative character.

The heirs could have compelled the administrator to perfect the title as if the father had contracted for it. [Champion v. Brown, 6 J. Ch. R. 398; Jackson, ex dem. v. Scott, 18 J. R. 94; Jackson v. Parker, 9 Cowen, 73.]

The administrator could not have made a purchase with the funds, of a new title, and if he did, the land retained the character of the money thus converted, and subject to the same incidents. And in taking the title to the heirs, there was still a trust resulting to the administrator, as such, and it remained subject to his disposal.

Collins was in no respect responsible for the application of the purchase money by the administrator. If the heirs have any rights, their remedy is on the bond filed by Martin to entitle him to the possession of the fund, and also upon his bond as administrator.

Whatever rights the widow may have had, have been vested in Collins, by her contract with him.

GOLDTHWAITE, J.—1. The complainant's title to relief, depends chiefly on the question, whether Peter Martin had such an interest in the land settled and cultivated by him, as was the subject of sale by his personal representative after his death. We state the question in this way, because it seems evident that no subsequent action of the widow, or heirs, with reference to the land, could change the rights of the administrator, and through him the creditors, if they had any.

It will be seen, on looking to the act of Congress, of the 29th May, 1831, and of June 19th, 1834, that the bounty of the government is not extended by express terms, to either the heirs or the personal representatives of the person entitled to the pre-emption. The privilege of entry, at the mini-

minimum price, is given to every settler or occupant of the public lands, who was in possession at the time of the enactments, and who cultivated the lands—by the first act, in 1829, or by the last, in 1833. [Land Laws, p. 1, 473, 525.] The construction of these acts, in the general land office, seems to have been that the pre-emption right in the event of the death of the settler previous to any abandonment of the lands, and before the entry was actually made, descended to his heirs at law. [See instructions, 23d October, 1833, Land Laws, p. 2, 582.] Such a construction of these acts, seems to be in entire accordance with principle, for it is common learning, that conditions annexed to an estate, descend to the heir, and he alone can take advantage of them. [Bacon's Ab. tit. Heir, C.] If the pre-emption acts are analyzed, it will be seen they grant a privilege to the settler, which may ripen into an estate in fee, if the prescribed condition of making proof, and paying the minimum price, is performed. Nothing can be more clear, however, than that this privilege is not in the nature of a contract, nor could the personal representative be compelled, in any manner, to appropriate the funds of the estate, to make the entry. The legal analogies, which in reality control this case, although remote, and of rare occurrence with us, are free from dispute, and entirely decisive. It is the well known rule of equity courts, to consider that done which is contracted to be done, and under its influence, decisions are numerous in the English courts, to compel an appropriation of the personal effects by the administrator, for the benefit of the heir or widow, to pay for lands contracted to be purchased, but not paid for, or the title passed by the execution of the necessary assurances. [Sugden on Vend. ch. 4, 211; see also, *Champion v. Brown*, 6 Johns. Ch. 398.] This rule is comparatively unimportant with us, when the same person is usually the distributee of the personal estate and heir to the real, and where too, lands are chargeable with simple contract as well as specialty debts. Yet its existence is so interwoven with the entire equity system, that it never can be lost sight of, although the cases may be rare in which its application will prevent one party from participating in a fund otherwise distributable to him, and transfer it to another, who, without the rule, would have

no rights. Although the rule referred to is of universal application, it is applied only to contracts, and these must be valid in point of law, to warrant the heir in claiming the application of the personal estate to pay for lands. [7 Vesey, 341.] The liability of the real and personal representatives, in respect of a contract, is, that of the party at the time of his death; if he could not then be compelled to take the estate, the heir cannot insist on having it, or that the personal estate shall pay for it. [10 Vesey, 607.] These cases show clearly, that the heir (assuming that his rights here are of the same nature as by the common law,) could not call on the administrator to pay for the land. Nor (to take the case, in which it is possible the rule might be invoked with us) could the widow call on either heir or administrator, to pay for the land, to secure her dower interest in it. There then being no obligation on Martin to pay out the land, his administrator was not authorized to do so, and if he had thus appropriated the funds of the estate, in our judgment, he would have been responsible in the event of a loss. So far then as the title to the land is concerned, we are constrained to say there was nothing which could pass by the sale, under the decree of the orphans' court, affecting the title now shewn by the heirs of Martin.

But, it may be asked, is it possible that one can have an interest in lands which is really beneficial, but which cannot be reached by a creditor during the life-time of his debtor, or even after his death be appropriated to discharge the debt? The answer is that the government of the United States has the sole disposition of the public lands, and if it chooses to permit its citizens to occupy them until actually sold, the creditor has no more right to complain than he would of the charity which gives his debtor shelter elsewhere. It is the settled law of this court, that a settlement and improvement on public lands, is not the subject of levy and sale under execution. [Rhea, Conner & Co. v. Hughes, 1 Ala. Rep. N. S. 219.] Whether the mere occupation might not be entered upon, held, or sold by the administrator, is a point which has never yet been presented, and therefore we decline to express an opinion upon it, further than we have already done. Conceding, however, the right so to enter, and to hold the

possession, or take the emblements, it seems clear that by a sale of it, the administrator could not pass the settler's right of pre-emption to the purchaser, or in any manner affect that of the heir.

There is another view which is pressed with much ability by the complainant's counsel, and it is, that as the funds were provided by the administrator, from the estate, that a trust results either to him or to the estate, and thus the equitable right to the land is conveyed by the deed. This would possibly be answered by the proof, that the purchase, instead of being made by the administrator, was, in point of fact, made by the widow and heirs ; but, without placing any stress on this fact, it seems to us that such a trust would be directly against the policy of the pre-emption acts ; as the bounty of the government was obviously intended for the settler and his heirs. A construction, therefore, which would make him or them trustees for the person advancing the purchase money, is not to be tolerated, as it would, in effect, transfer the bounty of the government from the settler to the lender of the money.

It is perhaps unnecessary to advert to this matter further, but as an equity may be supposed to arise, that the money advanced by Martin out of the funds of the estate, shall be accounted for by the heirs, we shall content ourselves with the remark, that it more properly falls under the head of payment by the administrator to them. Even if the estate administered by Martin, was insolvent, and its assets had not been squandered, we should doubt if the complainant would have any right to be considered as entitled to re-payment, as standing in the place of the administrator.

There can be no question, we think, as to the complainant's right to relief, in the present aspect of the case, as against the legal title vesting in the widow under the patent. This she is concluded from insisting upon, by the bond which she entered into ; but the decree must be so made as not to permit this to affect the future conducting of the suit at law.

The decree of the chancellor must be reversed, and the cause remanded, for such further proceedings as will conform to the opinion now pronounced. Reversed and remanded.

GORMAN v. NAIRNE.

1. A payment by an administrator of an insolvent estate, to a creditor, he binding himself "to hold the administrator harmless, in case said estate on settlement, does not pay enough to cover the above amount," is not an absolute payment, or an admission that the claim is just, but if the claim is rejected for want of presentation in time to the administrator, he may recover back the money so paid.

Error to the Circuit Court of Sumter.

THIS was a case agreed, presenting the following facts: That on and previous to the 4th May, 1844, the plaintiff was administrator of the estate of one George Clanton, which was reported insolvent. On that day the defendant executed to the plaintiff the following receipt:

Received of William Gorman, administrator of the estate of George Clanton, fifty-two dollars fifty cents, in part payment of a claim, which I hold against said estate; also a claim that Stafford & Nairne hold against said estate. I hereby agree to hold said Gorman harmless, in case said estate does not pay enough on settlement, to cover the above amount, on the claims we hold against said estate.

Signed,

JOHN W. NAIRNE,
STAFFORD & NAIRNE.

That before the commencement of this suit, the estate of Clanton was regularly and finally settled. Upon that settlement, the claims here referred to, were rejected, on the objection of the plaintiff, that they were barred by the statute of non-claim, and the plaintiff held to account for, and pay into court, the amount mentioned in said writing. That a large number of other claims were rejected at the same time, so that there were assets sufficient to pay the claims which were allowed, and that the defendant had notice of these facts, but had no personal notice of the time of the settlement, or of the intention of the administrator to object to the claims

at the time of the settlement. Upon these facts, the court was of opinion, the plaintiff was not entitled to recover, and rendered judgment for the defendant, which is the matter now assigned for error.

REAVIS, for plaintiff in error.

STEELE & METCALFE, contra.

ORMOND, J.—The evident meaning of the terms, “hold the said Gorman harmless,” &c. in the instrument recited in the record, is, that the plaintiff should not be prejudiced, by advancing to the defendant such a sum as would probably be coming to him, upon his claims, when the insolvent estate was finally settled.

It would be a most unreasonable interpretation of the contract, that the plaintiff intended to guaranty, that the amount so advanced, would in any event be coming to the defendant on his claims; or to guaranty the legal sufficiency of the claim. Nor can it be presumed, he designed to bind himself to make no objection to the allowance of the claims. His duty to each creditor required him to raise all proper objections to each claim asserted against the estate, and the advance must be understood as dependent upon the condition that the claim was allowed.

It was the duty of the defendant to support his claim, and as one of the creditors of the estate, having filed his claim, he is affected with notice of all the subsequent proceedings. The receipt by the defendant of the money, as on a claim due from the estate, implied an assertion on his part, that he had a legal claim against the estate; and this being unfounded in fact, it may be recovered back, either as money had and received to the use of the plaintiff, or upon the express promise of the defendant to hold the plaintiff harmless.

Judgment reversed, and cause remanded.

WEST, OLIVER & CO. v. BALL & CROMMELIN.

1. An attorney at law, in virtue of his general powers as such, has no authority to receive depreciated bank paper in payment of a debt placed in his hands for collection, and if he collects in such funds, his client is not bound to accept it.
2. A usage of the attorneys at any particular place, to collect money of their clients in bank bills of the State Bank, though selling at a depreciation, being contrary to law, cannot be supported. But if such a usage were lawful, it would be controlled by the direction of the client not to collect in depreciated funds.
3. B. & C., attorneys in Montgomery, collected by judgment, a debt for a client in New York, and received in payment bank bills of the State Bank of Alabama, with which they purchased a check from the Branch Bank at Montgomery, for the amount of their debt, (less their fee), which they remitted to the clients, on the 15th June, 1842. On the 23d June, they addressed a letter to the attorneys, refusing to receive the check, and denying their right to collect in depreciated funds, and informing them, they had remitted the check to P. & T. at their risk, for the purpose of exchanging it, or adding to it the amount of the exchange on New York. P. & T. communicated the contents of the letter to the attorneys, but they not offering to do any thing, remitted the check to the clients. On the 21st July ensuing, the clients again wrote to the attorneys, informing them that P. & T. had declined acting in the business for them, and had returned the check, and that it was held subject to their order, and requiring instructions in regard to it. Alabama bank notes were at a depreciation in Mobile, on the 25th May, 1842, of 25 per cent., and at the time of the receipt by the plaintiffs, of 30 per cent. in New York, at which rate it continued up to the 22d September following, when the clients sold it at this discount. Held, that these facts did not authorize the inference, that the clients had ratified the act of their attorneys—that their silence, when applied to by their clients, was tantamount to a refusal to act, and that after waiting a reasonable time, they had a right to adjust the matter by a sale of the check.

Writ of Error to the Circuit Court of Montgomery.

THIS was an action of assumpsit at the suit of the plaintiffs in error, to recover of the defendants the difference in value between a sum of money collected by them as attorneys at law for the plaintiffs, in bills of the Bank of the State

of Alabama and its branches, and specie funds. The declaration also contained the common counts.

The cause was tried by a jury, who returned a verdict for the defendants, and judgment was rendered accordingly. From a bill of exceptions sealed at the instance of the plaintiffs, it appears that they had employed defendants as attorneys to collect a note of about \$1000, made by Yeldell, Deming & Co.; that the plaintiffs resided in New York, and the makers of the note in Montgomery.

The plaintiffs inclosed the note in a letter to Messrs. Phillips & Tarrant of Montgomery, in which they requested them to settle it for them, and entrust it, if necessary, to a responsible friend for that purpose, or employ some responsible person to go to the residence of Messrs. Y. D. & Co. and settle it, the payees agreeing to pay all costs and expenses attending the business. The mode of settlement proposed, was to obtain as much cash as possible, at least more than half, and to give time for the residue, not longer than six months. In a postscript to their letter, the plaintiffs say, "by a written agreement, Yeldell, Deming & Co. agree to pay 'all ex. over 2 1-2 per c. that it may cost to collect and convert into current funds in New York, our note due 4-7 April, 1840, for 1026 31-100 dolls. Signed, Y. D. & Co.' In settlement, please exact according to this agreement. If you should be able to get any money on it, please forward by draft."

After an attempt to obtain the money without suit, Mr. Phillips, one of the firm addressed, placed the note in the defendants' hands for collection, without any instructions as to the kind of money to be received. Phillips acted for the plaintiffs under the letter, and placed the same in the defendants' hands before the collection was made, which after retaining for some time, they returned to him.

Suit was brought in the federal court in the spring of 1841, judgment obtained in the fall, and the money made by the marshal in the spring of 1842, who paid over to the defendants in satisfaction of the judgment, bills of the Bank of the State of Alabama and its branches. With these bills, the defendants procured a check from the Branch Bank at Montgomery, payable in current funds, for the amount of the debt, (less fees), which they remitted to the plaintiffs on 15th

June, 1842, in payment of the debt. On the 23d June, 1842, plaintiffs addressed a letter to the defendants, which was received in due course of mail, in which they say, they refuse to receive the check, denying the defendants' right to make a collection in such funds, informing them that they had remitted the same to Phillips & Tarrant, who would call on them for the purpose of exchanging it, or adding to it the amount of the exchange on New York. Plaintiffs say further, "the amount of money is at your risk during the time you may take to arrange it." A letter of the same date was written to Phillips & Tarrant of the import indicated, and referring to that to the defendants.

Phillips, on the receipt of the letter to P. & T. communicated its contents to the defendants, but did not tender them the check, nor did the defendants offer or decline to take it. P. did not show the plaintiffs' letter to the defendants with the intention to return the check, or act in the matter, unless defendants offered to take it back. Upon the defendants not doing any thing, he remitted the check to the plaintiffs.

On the 21st July, 1842, the plaintiffs again wrote to the defendants, recapitulating the substance of their previous letter, informing them that Messrs. P. & T. had declined acting in the business for them, had returned the check, and that plaintiffs held it subject to their order—"declining to receive it for the full amount of our (their) claim," and adding, "the check is on the Bank of Mobile for \$1118 10-100. No. 82. Please instruct us regarding the check."

It was proved that the bills of the State Bank and its Branches, were on the 25th May, 1842, at a depreciation in Mobile of *twenty-five per cent.* and at the time of the receipt of the check by the plaintiffs, in June, at *thirty per cent.* in New York; at which rate it continued, with slight fluctuations, up to the 22d September following, when the plaintiff sold the check at that discount. The aggregate received by them being \$782 67.

The attorneys of Montgomery, previous and up to the time the judgment was satisfied, as above shown, were in the habit of collecting money for their clients in such bills, and it was the customary mode of collection with them. The written agreement, an extract of which is contained in the

postscript of the plaintiffs' first letter was not in the hands of the defendants, until after the check was remitted.

The court charged the jury, that the letter to P. & T. was a general power to have the note collected, and if they believed that P. & T. lived in Montgomery, that they employed defendants to collect the money without giving them any specific instructions; that it was the general custom of attorneys to collect debts in the kind of money collected in this case, then defendants are not liable in this action; although Messrs. P. & T. may have been ignorant of the existence of such a custom, yet it entered into, and formed a part of the contract.

Although the jury should believe that the letter containing the postscript was in defendants' hands, and they read the postscript, yet, unless the plaintiffs placed the agreement itself in defendants' hands, before the collection of the money, the defendants were not bound, in opposition to the custom, to obtain satisfaction of the judgment in gold or silver, or other funds than those received by them. The questions arising upon the ruling of the court are regularly reserved.

J. A. ELMORE, for the plaintiffs in error, made the following points: The law fixes the duties of attorneys, and no usage can vary their duties. [Price, et al. v. White, 9 Ala. Rep. 563, 566; Cook & Lamkin v. Bloodgood, 7 Ala. Rep. 683.]

The check was payable in this State, in *current funds*, here, and does not mean *monies*, and unlike the cases in 4 Ala. Rep. 88, 140; Carlisle v. Davis, 7 Ala. Rep. 42. The proof showed that it was purchased with notes of the State Bank and Branches, then at a discount of twenty-five per cent.

A demand of the agent of the monies misapplied, is no ratification of his acts. [Blevins v. Pope & Son, 7 Ala. 371.] But if a ratification, it would not discharge the agent, but the party only with whom the agent dealt. [Cook & Lamkin v. Bloodgood, 7 Ala. Rep. 683; Bell v. Cunningham, 3 Peters, 81.] On refusal of defendants to arrange the debt, plaintiffs had the right to sell the check, and charge defendants with the difference.

J. W. PRYOR, for the defendants in error, made the following points: 1. There is nothing in this record which shows that the check which defendants sent to plaintiff, if presented at the Bank of Mobile, would not have been paid in gold and silver. The check was payable in current funds. The plaintiffs put their refusal to receive the check on the ground that it was payable in current funds, not on the ground that it was not drawn on New York. [4 Ala. R. 88.] There is no evidence in the record tending to show what "current funds" mean in the check. [Ib. 140.] In the absence of any such evidence, these words mean necessarily but one thing—that they are money—gold and silver. The court cannot infer that they mean any thing else. It is not necessary to inquire what might be the effect of evidence tending to show that the words mean any thing else than money. Then, the plaintiffs received from defendants a check for the amount of the demand on the Bank of Mobile, which Bank has never stopped payment. They did not object to the check on the ground that it was payable in Mobile. The check was a good one for money, payable at a place not objected to. There is no evidence in the record tending to show that the check would not have been paid in full if presented at the Bank of Mobile.

2. But instead of presenting the check at the Bank, for payment, the plaintiffs sell it. By this act they ratified the acts of defendants, without reference to the character of the check. The sale was an assumption of ownership by the plaintiffs, and amounted to a full ratification of the acts of defendants, &c. The plaintiffs in selling acted as principals, and therefore as owners of the check, or as agents of the defendants. They could not act as agents of the defendants without some authority, express or implied. No express authority is shown, and no implied authority can be inferred from the acts of the plaintiffs and defendants. These acts indicate the intent of the plaintiffs to act on their own account. The sale of the check, instead of presenting it at the Bank, was a clear act of ownership. This case is not at all analogous to the case of a contract to pay specific articles, where a tender of the articles, according to the terms of the contract, vests the title to the articles in the party to whom

the tender is made, and discharges the party making the contract from all liability on the contract, &c. If the party, after the tender, retain possession of the articles, he holds them as the *bailee* of the party to whom the tender was made, &c. [Lamb v. Lathrop, 13 Wend. 95; 2 Kent's Com. 508, 509.] In the case before the court there was no tender, and if a tender had been made, it would not have vested the title to the check in the defendants, for the plaintiffs in error insist that it was never out of them. But the act of selling the check was a ratification of the acts of the defendants. [Story's Agency, 245, § 250; 247, § 253; 248, § 255; 250, § 258; Cornwall v. Wilson, 1 Vesey, sen. 509; Pickett v. Pearsons, 17 Vermont, 470, 478.] These two cases are very strong.

3. The charges given were abstract, for it was not material in what the defendants collected the amount of the judgment, as they remitted to the plaintiffs a check for the whole amount due them, payable in "current funds;" that is, in *money*. The remittance being thus made, it was an immaterial inquiry as to the character of money, or Bank paper, in which the collection was made.

COLLIER, C. J.—In Gullett v. Lewis, 3 Stew. Rep. 23, it was said, that an attorney at law is the agent of his client, and when a note is placed in his hands to collect, the only power granted to him is to receive the money, if the debtor will pay it, or to enforce its payment by suit; and consequently he has no right to dispose of the demand in payment of his own debt, or to accept any thing in discharge of the liability but cash. [See also Cook & Lamkin v. Bloodgood, use, &c. 7 Ala. Rep. 683.] It has been decided, that a paper medium of currency is not money. [Lange v. Kohne, 1 McCord's Rep. 115.] And if an attorney collect bank bills in lieu of specie, without authority, he is responsible as for a failure to collect. [Wickliffe v. Davis, 2 J. J. Marsh. Rep. 69.] As to the description of funds which a sheriff should receive on a *feri facias*, or by which a judgment may be satisfied, see Catlett v. Alexander, 4 How. Rep. (Miss.) 404; Morton v. Walker, 7 Id. 554; Gasquet v. Warren, 2 S. & Mar. Rep. 514; Wood v. Robinson, 3 Id. 271; Lehr v.

Rogers, Id. 468 ; Anketel v. Torrey, 7 Id. 467 ; Tutt v. Fulgham, 5 How. Rep. (Miss.) 621 ; Anderson v. Carlisle, 7 Id. 408 ; Havener v. Kerr, 1 South. Rep. 58 ; Cox v. State Bank, 3 Hals. Rep. 172 ; Hallowell, &c. Bank, 13 Mass. Rep. 235 ; Anderson v. Hawkins, 3 Hawks' Rep. 568 ; Moody v. Mahurin, 4 N. Hamp. Rep. 296 ; Goodenow v. Duffield, Wright's Rep. 457 ; Adkins v. Blake, 2 J. J. Marsh. Rep. 40 ; Sinclair v. Piercy, 5 Id. 64 ; Bobo and Johnson v. Thompson, 3 Stew. & P. Rep. 385 ; Haynes v. Wheat & Fennell, 9 Ala. Rep. 239.]

We think it clear that an attorney at law, in virtue of his general powers as such, has no authority to receive depreciated bank paper in payment of a debt placed in his hands for collection, and if he collects it in such funds, his client is not bound to accept it in satisfaction. The debtor cannot discharge himself by a payment in any thing else than gold and silver, without the consent of his creditor ; nor does the mandate of a *fieri facias* require of the officer to make of the defendant's estate any thing else than gold or silver. And if he accepts bank bills which are selling at a discount, neither himself nor the attorney of the plaintiff can compel the latter to receive them as money. These conclusions are so fully supported by the citations we have made, that they do not require illustration.

But if the law were otherwise, the instructions of the plaintiffs in their letter to Messrs. Phillips & Tarrant, and the postscript thereto, would have modified the duty of the defendants, and furnished a different rule for their guidance. It was not necessary that the agreement of Messrs. Y., D. & Co. recited in the postscript should have *been placed in the defendants' hands*, in order to charge them with notice of its contents, or to have informed them in what description of funds the plaintiffs wished the collections to be made. The instructions contained in the letter, and the recital of the agreement were quite sufficient.

In respect to usage of attorneys in Montgomery, to collect the demands of their clients in bills of the bank of this State and its branches, though selling at a depreciation, we are satisfied that it did not, under the circumstances of the present case, authorize the defendants to make a collection in such

funds. It has been repeatedly decided, that the usage of no class of men can be supported in opposition to the established principles of law. [Homer v. Dorr, 10 Mass. Rep. 29, 29; Newbold v. Wright, 4 Rawle's Rep. 195; Henry v. Risk, 1 Dall. R. 265; Stoever v. Whitman, 6 Binn. R. 417; Brown v. Jackson, 2 Wash. C. C. Rep. 24; Westfall v. Singleton, 1 Wash. Rep. 227; Prescott v. Hubbell, 1 McC. Rep. 94; Bryant v. Commonwealth Ins. Co. 6 Pick. Rep. 131; Bolton v. Colden, 1 Watts' Rep. 360; Price v. White, 9 Ala. Rep. 563; Desha, Smith & Co. v. Holland, at this term.] In Barksdale v. Brown, 1 Nott & McC. Rep. 519, it was held, that no usage will authorize a factor or agent to depart from positive instructions. Nor will the usage of a particular business bind a party who makes a contract relating to it, unless the usage is so general as to furnish a presumption of knowledge, or it is proved that he knew it. [Wood v. Hickok, 2 Wend. Rep. 501; Stevens v. Reeves, 9 Pick. R. 198.] So it is said that a custom should not only be so ancient as to warrant the inference that it is generally known, but it should be certain, uniform, and reasonable. [Rapp v. Palmer, 3 Watts' Rep. 178; Consequa v. Willings, Peters' C. C. Rep. 230; Chastain v. Bowman, 1 Hill's R. (S. C.) 270; and cases cited in Price v. White, *ut supra*.]

Even if it were competent to modify by usage the law which regulates the duties of attorneys at law in the collection of money, such a usage could not operate in opposition to the instructions of the client. If an attorney receives a note or other evidence of a debt to collect, with instructions as to the kind of funds to be received in payment, these instructions would, so far as they extended, constitute the contract between himself and his client, and he would be chargeable for any loss which would result from a departure from them. The agreement of Messrs. Y., D. & Co. recited in the postscript of the first letter shows, that the plaintiffs were not to lose more than two and a half per cent. in transmitting their funds to New York; and this agreement was not only obligatory upon Messrs. Y., D. & Co. but should have been regarded by the defendants as a direction to them. But if the plaintiffs had given no instructions on this point, was it not

the duty of the defendants to have collected what the face of the note imports they had promised to pay—a certain sum in money ; and is not any custom which changes the implied undertaking of attorneys, so as to permit them to receive depreciated bank paper as an equivalent for money, unreasonable, and in opposition to law? *Besides*, does it appear that the custom was known to plaintiffs, or of such ancient date that their knowledge will be presumed? We do not deem it necessary to stop to answer these questions, for it is clear from what has been already said, that the custom relied on, cannot be supported against the plaintiffs.

We can perceive nothing in the facts from which it can be inferred, that the plaintiffs ratified the act of the defendants, in collecting their debt in bills of the Bank of the State and its Branches. As soon as they received the draft, payable in “current funds,” they addressed a letter to the defendants, in which they are informed that the plaintiffs refuse to receive it, and deny their right to collect such funds; *and further*, that the draft had been remitted to Messrs. P. & T. who would call on them to exchange it, or add the rate of exchange on New York, &c. Mr. P. called on the defendants immediately on the receipt of the letter to Messrs. P. & T. and communicated its contents to them, which was substantially the same as that written to the defendants. After the return of the draft by Messrs. P. & T. to New York, the plaintiffs wrote to the defendants another letter of the same import as the first. It is explicitly stated that the first letter was received in the due course of mail, and it is not pretended that the second did not reach its destination.

The first letter written to the defendants was of the same date of that to Messrs. P. & T., and must have been in their hands when Mr. P. called on them. This letter, when connected with the fact, that Mr. P. informed them that he had the draft, was an offer to return the draft, or adjust the matter as the plaintiffs proposed; and the defendants’ silence was tantamount to a refusal to do any thing in the business. To show the correctness of this proposition, it is only necessary to state it.

Perhaps the proof would have been less liable to criticism if it had been shown *in totidem verbis*, that by "current funds," were meant bills of the State Bank and its Branches; but is not this fairly inferable from the fact that the collection was made in that description of funds? However this may be, the reverse cannot be assumed, and all the defendants can claim is, that the fact should have been submitted to the jury. This was not done, but the rulings of the court foreclosed the inquiries of the jury on the point.

The remaining question then is, were the plaintiffs bound to present the draft to the Bank of Mobile for payment. We think no such obligation rested upon them. The plaintiffs resided in N. York, and the entire transaction shows, that they there expected to realize their funds, however the remittance was made. After waiting upon the defendants for a reasonable time, to adjust the matter, so that they could receive their money, with a deduction of nothing more than the difference of exchange between New York and Alabama, if exchange on specie or its equivalent was in favor of the former, there was no objection to putting the draft into the market.

This view is decisive of the case, and the consequence is, that the judgment must be reversed, and the cause remanded.

HOSEA, JR. v. MCCRORY.

1. Where the proof shows the delivery of a letter or package containing money, to be carried between two places, at each of which is a post office, a recovery may be had on a count charging the defendant as a bailee to deliver the money on request, even if the contract to carry is conceded to be invalid, as opposed to the post office laws.

2. Although ordinarily a steamboat may not be compelled to take charge of a cash letter, yet if the general usage of boats in a particular trade to take charge of such letters is shown, the delivery of such a letter to a particular boat, will be governed by this common usage.
3. The delivery of a cash letter to the clerk of a steamboat, is a delivery to the master for the purpose of charging him, and it is not necessary to show a special authority to the clerk to receive cash letters, when a general usage of boats in the trade is to receive them.

Writ of Error from the Circuit Court of Mobile.

ACTION on the case, by McCrory, against Hosea. Several of the counts are against the defendant as common carrier, and alledge the delivery to him by the plaintiff of a letter containing \$183 15, to be safely carried from Mobile to Pickensville. In other counts, the money is charged to have been deposited with the defendant, to be re-delivered to the plaintiff on request, as well as to be kept with due and proper care.

At the trial, on the general issue, the deposition of a witness was read, stating he was the clerk to the house which remitted the money, in January, 1842, and as such made out the account sales for the plaintiff, of cotton sold for him. The balance due he did not remember with certainty, but to the best of his recollection it was \$183. He handed a letter inclosing the balance of the account in bank bills, to the clerk of the steamboat Belle Poule.

There was also evidence tending to show the custom of steamboats in general, and of the practice of the Belle Poule, to carry cash letters from Mobile to their places of destination; that the defendant was master and owner of the Belle Poule when the letter in question was delivered to its clerk; that the letter was marked *cash*; and that other letters of a like kind had been received at other times by the defendant himself, in the absence of the clerk of the boat; also that no compensation for such letters was usual. The defendant then offered a witness, who testified that for many years he had been connected with steamboats plying on the Alabama rivers, and from his knowledge of the trade, the carrying of letters was a mere gratuity on the part of the carrier; that boats

have always been considered privileged to carry or refuse to carry such letters at pleasure; that in general no receipt is given, and when receipts have been required, the witness has always known them refused. So far as the witness knew the understanding of the trade on this subject, it was, that no liability was incurred by the master or owner, for the carriage of letters by the clerk. Another witness corroborated these statements, and proved there were post offices at Mobile and Pickensville at the time of the supposed loss. No evidence in reply was offered, and on this state of proof the court charged the jury—

1. That a contract to carry a letter from Mobile to Pickensville, there to be delivered, would be illegal, and could not be enforced in this action; but if the evidence showed the letter was to be delivered at another place, the rule would not apply.

2. That although the letter was to be delivered at Pickensville, this would only preclude the plaintiff from recovering on those counts which thus set out the contract, but would not preclude a recovery on the other counts.

3. That although the defendant could not be considered as a common carrier, yet if the proof showed it was the custom and usage for clerks to carry letters, the clerk must be regarded as the agent of the master, and a delivery to the clerk was a delivery to the master for the purpose of this suit.

The defendant then asked the court to charge—

1. That the depositions of the plaintiff's witnesses contained no competent proof as to the amount claimed.

2. That the master is not liable in this action, without proof that the clerk was authorized to carry cash letters.

These charges were refused, and the defendant excepted, as he did also to those given.

P. PHILIPS and JEWETT, for the plaintiff in error, insisted—

1. That the charge first given could not be sustained, because, if a different place than Pickensville was where the letter was to be delivered, then the contract proved would be variant from that described.

2. There could be no recovery on the counts against the defendant as bailee, without showing gross negligence. The

liability of a mere gratuitous bailee is different from that of a common carrier, and the terms of his undertaking must be proved by the plaintiff. [2 Greenl. Ev. 172; 2 Steph. N. P. 995; 2 B. & P. 416.]

3. A carrier is not responsible for the acts of his servants, when such acts are not within the general scope of their business. [2 Starkie, 181; 2 Steph. N. P. 977; 2 C. & P. 613.]

4. The proof here does not show the delivery of the letter was to the clerk as clerk of the steamboat, or that he had any authority to receive cash letters. This was necessary, unless the master, as a common carrier, was bound to carry cash letters. [2 C. & P. 613.]

G. N. STEWART, contra.

GOLDTHWAITE, J.—1. As this case can be decided without the examination of the question, whether a contract to carry a cash letter between two places, at each of which there is a post office, is invalid, as trenching on the post office regulations, we shall not consider it. Assuming, as the court below seems to have assumed, that such a contract has no validity, this furnishes no excuse for a refusal or neglect to deliver the letter when demanded, or for its loss, when the proper care for its preservation is wanting. The different counts of the declaration vary the statement of the cause of action, so as to allow the plaintiff's recovery, if the money is traced to the defendant's custody, and not afterwards accounted for upon request. We think the depositions offered by the plaintiff were entirely sufficient to warrant the conclusion that a particular sum of money was delivered to the clerk of the steamboat whilst the defendant was master, and in our judgment, the only real subject for dispute, is whether the latter is liable in consequence of the general usage of steamboats in this trade, to carry such letters.

2. Ordinarily, a steamboat could not be required to take charge of a cash letter, because the business of freighting does not include the transmission of money in that mode. Nor does it include, as we presume, the carrying of live stock or slaves, yet no one can doubt as to the former, that such a general usage and custom may have obtained, as to make the

boat and its master responsible on the contract of an under officer in respect to such property. It is a general rule, of the utmost utility, that where parties have not entered into any express and specific contract, a presumption nevertheless arises, that they meant to contract and to deal according to the general usage, practice and understanding, if any such exist, in relation to the subject matter. [2 Starkie's Ev. 258.] The extent to which a general usage may impose an additional liability on the owners of a steamboat or vessel, is forcibly illustrated by the case of *Emery v. Hersey*, 4 Greenl. 407, where the owner of a vessel was held liable for the proceeds of goods shipped on his vessel, and consigned to the master for sale. [See also *Morely v. Lord*, 2 Conn. R. 389; *Taylor v. Watts*, 3 Watts, 65.] In *Sewall v. Allen*, 6 Wend. 335, the general responsibility of steamboat owners was considered as not extending to cover the loss of money entrusted to the captain, but there it is conceded the liability would exist, if this course of business was warranted by custom and usage. The previous decision of the supreme court in the same cause, (2 Wend. 335) was based on the fact, that the money was received by the master, and the custom proved, was for the master to carry packages of money on his own account—the compensation being a personal perquisite.

3. In the case at bar, the court put it to the jury expressly on the proof of a general usage, and charged that, if the evidence showed this general usage, the clerk must be considered as the agent of the master, and a delivery to him was a delivery to the master, for the purpose of the suit. This, we think, was a correct exposition of the law on this subject, and the charge which the defendant afterwards requested, that the master was not bound, without proof that the clerk was authorized to carry cash letters, evidently refers to a *special authority*, independent of the general usage. In this view, it was properly refused, as all which the plaintiff was required to show, was a delivery of the letter to some one placed by the master in a capacity to act for the boat. [*Butler v. Basing*, 2 C. & P. 613.] The whole case proceeds on the ground that the clerk of a boat is the person placed by the master and owners, to receive whatever the boat may

carry, according to the general custom of trade; and if there was any question intended to be raised as to the precise extent of his agency, it rested with the defendant to show its limitation, after it was made out that he was the clerk of the boat.

We think the cause was properly submitted to the jury on the general custom, though in this particular instance, it is very possible the particular usage of this boat was of itself sufficient to charge the master.

The views we have expressed seem in entire accordance with those declared by Judge Story in *The Citizens' Bank v. Nantucket Steamboat Company*, 2 Story, 16, which we had no opportunity to examine until the opinion was written. There a common usage was established, and the learned judge considered this as *prima facie* sufficient to charge the owners, though in that particular case it was rebutted by other proof, which induced the judge sitting as an admiralty court, to decree for the defendants. We are not called on to express an opinion, whether the verdict in this case was proper under the evidence, as that was for the judgment of the court below in awarding or refusing a new trial. There seems to be no error in the propositions on which the case went to the jury.

Judgment affirmed.

BRYANT v. CRAIG.

1. A guardian who fails to make annual settlements of his accounts, is liable for interest on the funds in hand; but is not liable to be charged compound interest, unless he is guilty of such gross neglect, as is evidence of fraud. The mere omission to make annual settlements, is not evidence of fraud, so as to authorize the charge of compound interest.
2. A guardian may apply to the orphans' court for authority to invest the

funds of his ward, and if lost without his fault after such investment, he will not be personally responsible.

3. In settling the accounts of a guardian, the court should charge the guardian with interest on all money of the ward in his hands, from the time of its receipt, and allow him interest on all disbursements from the time they were made, the interest due from the guardian to extinguish *pro tanto*, or in full as the case may be, the expenditure of the ward.

Writ of Error to the Orphans' Court of Greene.

ON the final settlement of the accounts of the defendant in error, as guardian of Joseph H. Bryant, it appeared that the guardian had received for his ward a large sum of money. There was no evidence to show that he had lent, or attempted to lend the money so received by him. The ward then moved the court so to state the account, that at the end of each year, after the receipt of the money by the guardian, a balance be struck, and that the balance so struck, with interest for one year, be carried into the account of each succeeding year, which, with the amounts received during the year, will make the sum, with which the guardian should be charged, and from that sum so made up, deduct the payments made by the guardian during the year, and strike a balance; and that the balance so struck at the end of each year, with interest as above, be carried into the account of each succeeding year. This motion the court overruled, and audited the account, by allowing interest upon the receipts, and disbursements, up to the settlement, without making annual rests, and carrying the annual balances, with interest, into the account of the succeeding year.

This is now assigned as error.

BLISS & BALDWIN, for plaintiff in error.

I. The court erred in refusing to audit the account, so as to make rests and compound the interest.

Admitting that it is not proper ordinarily to compound the interest, yet it is proper in peculiar cases; of which this is one.

Here the trustee acted with gross neglect, in which cases

he should be charged after this mode. [2 Kent's Com. 188; Fay Judge v. Howe, 1 Pick. 527; Raphael v. Boehm, 11 Vesey, 92; Schieffelin v. Stewart, 1 Johns. R. 620, and authorities cited; Hill on Trusts, 374; Ib. 523; 2 J. J. Mar. 240; 1 Pirtle's Dig. 491.]

II. The guardian used the money himself for many years, and might have, but wholly failed to, invest it. He is to be considered a borrower on such terms as others would have borrowed; and by these he would have collected interest annually and loaned it out. [Whiting, et al. v. Walker, et al., 2 B. Monroe, 262; Handley v. Snodgrass, 9 Leigh, 484; Garrett v. Carr, 3 Leigh, 407; Comegys v. Dykes, 10 Gill & Johns. 180.] And his failure to make annual settlements put him in no better situation than if he had made them; in which event the interest would have been productive. [1 J. J. Marsh. 440; 1 Pirtle's Dig. 491; see also, De Peyster v. Clarkson, 2 Wend. 77.]

III. The English rule, founded upon the different state of things as to value and abundance of capital, between Great Britain and this State, is not applicable here; and the facility of investment, at compound interest, especially where the fund is in hand a long time, is difficult. The *rule* on which the English mode of computation is founded, that no profit shall be made by the trustee, requires this.

IV. But if the court did not err in adopting the rule invoked by the plaintiff, it did err in adopting the principle on which it audited the account.

1. The interest accruing on the ward's capital, and due from him to the ward, is to be applied to the disbursements made for the ward's support. [Garrett v. Carr, 3 Leigh, 416; 2 Lomax on Ex. 352; Chaplin v. Morris, 7 Monroe, 163; McCracken's Heirs v. McCracken's Ex'r, 6 Monroe, 349; Whitledge's Heirs v. Cullis, 2 J. J. Marsh. 404.] In this case the capital of the ward is trenched on, which cannot be done. [See particularly De Peyster v. Clarkson, 2 Wend. 77.]

2. By the principle the court adopted, it results, that in eighteen years and ten months, the principal sum is paid off by paying punctually the interest, and counting interest on the payments.

3. The rule between the debtor and creditor is, to apply a payment to interest. [2 Com. Dig. 669; 2 Johns. Cr. R. 200.] Equitably, a guardian owning interest on his ward's money is debtor—indeed he is technically a debtor.

V. A guardian advancing, as in some instances in this account, beyond the income of the ward, will not be allowed interest on a balance due for maintenance. [McDowell v. Caldwell, 2 McC. Ch. Rep. 297.]

VI. There is no difference between a guardian and an executor with a trust to put out the funds; for the law requires this by the guardian.

J. B. CLARKE, for the defendant in error, made the following points :

1. That the orphans' court is a court of law, and possesses no power to make annual or other rests, in a guardian's account, so as to give to the ward compound interest, or interest upon interest, against the guardian. [Clay's Dig. 198, § 28; 226, § 27; 267, § 3; 2 Peters' Rep. 338; Hopkins' R. 424.]

2. A court of equity could not charge the guardian with more than legal interest, unless the evidence showed that the guardian had made more, or unless he refused to disclose his profits. [2 Kent's Com. 230, 231; Hop. R. 424; 10 Ala. R. 900, 914; 2 McC. R. 200.]

3. The rule of the English chancery of charging what is termed equitable interest against a trustee, does not seem to have been adopted in this country, nor to be very satisfactory there. [5 Ala. R. 313; Hop. R. 424; 2 Wend. 77; 2 McC. Ch. R. 255, 267; 2 Porter, 378; 8 Eng. C. C. Rep. 178; 10 Ala. Rep. 900, 914; 5 Rawle, 323; 2 U. S. D. 482, § 121; 1 Bin. 194.]

4. The rule to compute legal interest in the receipts and disbursements, is practical and just to the parties, and the one sustained by this court. [Cunningham and wife v. Poole, 9 Ala. R. 615.]

5. Computing interest on the balance at the end of the year, from that time to the final settlement on the receipts and disbursements of the year, for or against the guardian as that balance may be shown, presents a more simple and prac-

tical mode of stating the accounts, than to compute interest on each distinct receipt and disbursement, and is equally just and certain in the result.

ORMOND, J.—The manner in which the account of the guardian was stated, presents the question, whether a guardian who retains his ward's money in his hands, without investing it, is subject to have annual rests made in his account, and charged compound interest.

The general rule applicable to all trustees is, that they should not be permitted to make a profit for themselves, by the employment of the funds in their hands, and if it be invested in trade, or otherwise profitably employed, the *cestui que trust* may insist on the profit so made, if he elect to do so. No question of that kind is made here, as it does not appear how, or in what manner these funds were employed by the guardian.

But although a trustee may not have invested the trust funds in such a manner, that the profits made by their employment can be ascertained, yet if he suffers the fund to be idle, when the terms of the trust, or the general law, requires it should be invested, so as to yield a profit, he is chargeable with simple interest; or if he is guilty of such gross neglect in the execution of the trust, as to be evidence of a corrupt intention, he may be charged with compound interest. These principles are fully illustrated in many cases, of which the following may be cited as examples: Foster v. Foster, 2 Bro. C. C. 616; Raphael v. Boehm, 11 Vesey, 92; Pocock v. Redington, 5 Id. 794; Dornford v. Dornford, 12 Id. 127; Scheiffelin v. Stewart, 1 Johns. Ch. 620; Clarkson v. De Peyster, 1 Hop. 424.

As the guardian could not be guilty of negligence, in not investing the money of his ward, unless the law requires him to invest it, the first question which naturally presents itself is, what is the law upon the subject? Our statute law, though very full and particular, as to the mode of appointing guardians, making settlements with them, &c., is silent upon this particular. It results however, necessarily, from the nature of the trust, that the estate of the ward should be profitably employed, as otherwise it would be consumed, and

where it consists of money, this could only be by lending it out on good security. In England, a trustee whose duty it is to invest the money in his hands, is exonerated from liability, by investing it in the public funds, which, as the court would direct to be done on application, it will sanction if done without such application, and he will be exonerated from liability, though the stock should fall in value. [Franklin v. Frith, 2 Bro. C. C. 433 ; Holmes v. Dring, 2 Cox, 1.] In Smith v. Smith, 2 Johns. C. 284, Chancellor Kent seems to think, that personal security is insufficient, and that a trustee lending money, must require adequate real security, or resort to the public funds. Here are no public funds in which money may be safely and securely invested. At least there has been none until very recently, and it is not probable we shall be long burthened with a public debt.

Personal security, no matter how good it was deemed at the time, would not be sufficient ; and it may be added, that with us, real property is subject to such fluctuations, that it is by no means an adequate security : and it may very well be doubted, whether he would not be personally liable, for any loan he may have made of the money, without the sanction of the court, no matter what security he may have taken. Our statute appears to have intended to place this whole matter under the direction of the orphans' court, as it invests that court with power to direct a sale of the land of the ward, if the personal estate, and the rents and profits of the realty, were insufficient for his support ; and it appears to follow necessarily, that the same court would have the power to direct in what manner the money of the ward should be invested. It was the duty of the guardian, if he desired to exonerate himself from the payment of interest, to apply to the court for direction in the investment of the funds, who would have examined the proposed security, and whose approbation would have exonerated the guardian from liability, if afterwards lost without his neglect.

The guardian having omitted to make this application, must pay interest on the funds in his hands, whether they have been profitable to him or not, and we next proceed to inquire, whether this is such gross negligence, as will autho-

rize rests to be made in the account, for the purpose of charging him with compound interest.

The general rule undoubtedly is, that where it is the duty of the trustee to invest the trust funds, and he fails to do so, he is chargeable only with simple interest. See the cases already cited, and *Newton v. Bennett*, 1 Bro. C. C., in the note to which, Mr. Eden has collected all the authorities, establishing conclusively, that for neglect merely, the practice of the court is, to charge interest at the rate of four *per centum*. Where the trustee is guilty of fraud or corruption, as where, in open violation of the trust, he applies the funds to his own use in trade; converts the property, or securities, as for example, stock, into money, and applies it to his own use; or otherwise corruptly and fraudulently abuses the trust reposed in him; he may be charged with compound interest. The first case, it is said, in which compound interest was charged against an executor, is *Raphael v. Bøhm*, 11 Vesey, 91. That was a case of gross misconduct, and violation of the terms of the trust, by embarking the funds in trade, instead of investing them for the purpose of accumulation, as directed by the will. The principle established by this case, does not appear to have been followed in cases, where the facts appear to be very similar. [See *Ashburnham v. Thompson*, 14 Vesey, 402, and *Tebbs v. Cunningham*, 1 Madd. R. 291.] In this last cited authority, all the cases are collated, and elaborately examined; and although there was in that case a direction in the will, that the assets should be invested in the public funds, which was not done, yet the vice chancellor refused to allow compound interest. He sums up an elaborate, and able view of the authorities, thus: "It appears, therefore, from this view of the authorities, that a distinction has been taken, as in every moral point of view there ought to be, between *negligence*, and *corruption* in executors. A special case is necessary, to induce the court to charge executors with more than four *per cent.* upon the balances in their hands. The obligation on executors, to lay out balances not wanted for the exigency of the testator's affairs, is now better understood, since it has been settled that they are indemnified against any loss, in laying them out in the fund which the court sanctions, the three per cents. If

the executor has balances, which he ought to have laid out, either in compliance with the express directions of the will, or from his general duty, even where the will is silent on the subject, yet if there be nothing more proved, in either case, the omission to lay out, amounts only to a case of *negligence*, and not of *misfeasance*."

Chancellor Kent, in *Schieffelin v. Stewart*, 1 Johns. Ch. 620, adopts the stringent rule laid down in *Raphael v. Bøhm*, *supra*, without adverting to the distinction, between neglect and fraud; but in the subsequent case of *Clarkson v. De Peyster*, Hop. Ch. 424, the chancellor refused to allow compound interest, in a case, in all its material features not distinguishable from the case before us, and the decision was affirmed on appeal.

The cases cited from the Tennessee and Kentucky Reports, are not applicable in this State. In both those States, statutes exist, requiring the guardian to invest the money of his ward. [*Hughes v. Smith*, 2 Dana, 252; *Torbet v. McReynolds*, 4 Hump. 215; 1 vol. Kentucky Stat. 768; Car. & Nicholson's Dig. 368.]

The charge of compound interest, seems to be adopted as a punishment, in those cases, where from the gross mismanagement of the trustee, it is difficult, if not impossible to ascertain, what the income of the estate would otherwise have been; but it may be safely asserted, that no estate in money, under the most judicious management, can be made to yield compound interest, at the rate of eight *per centum*. If it had been annually invested, under the direction of the court, some delay must have been encountered, in finding a person desirous to borrow, and able to give the necessary security. It is not reasonable to presume, that where so lent, it would always be punctually paid, so as to be immediately re-invested; nor can it be doubted, that it would frequently be necessary to coerce payment by suit; and that after every precaution had been taken, both principal and interest would occasionally be lost. The charge of compound interest, therefore, is unjust, because the estate could not have yielded that by any prudent management in the hands of the owner, had he been of age to manage it himself.

The mere omission of the guardian, to apply to the court for authority to invest it, and the failure to make annual settlements, are not evidence of fraud, but establish negligence merely, and the court therefore acted correctly in refusing to allow compound interest.

We come to the consideration of the remaining question. In stating the account, the judge of the orphans' court charged the guardian with interest on money received by him, and allowed him interest on the sums disbursed, calculating each from the time it accrued, to the time of the settlement. This was erroneous. The statute previously cited, requires the guardian to render, at least once a year, an account of his receipts and disbursements. If this had been done, the disbursements would have been extinguished, *pro tanto*, by the interest, which the guardian should have charged for the money of the ward in his hands, and he cannot place himself in a better condition, by this neglect of duty, than if he had performed it. It could not be tolerated, that the guardian should hold the estate in his hands for a number of years, use the interest of the ward's capital, or which comes to the same thing, neglect to apply for its investment, and encroach annually upon the capital for the support of the ward; for this is the effect of the mode of accounting adopted by the court.

If it was shown, that the guardian was compelled to keep on hand a certain sum of money to meet the expenditure of his ward, it would be the duty of the court not to charge interest on such sum. In the absence of such necessity, which is not shown, and which probably did not exist, it was the duty of the court to charge the guardian with interest on all money of the ward in his hands, from the time of its receipt, and allow him interest on all disbursements from the time they were made; the interest due from the guardian, to extinguish *pro tanto*, or in full, as the case may be, the expenditure of the ward. For which purpose, if necessary, the court will make annual, or longer or shorter rests in the account, so as to carry fully into effect the objects and purposes of this decree; but so as not in any manner to compound the

interest against the guardian. These principles are clearly stated in the case of *De Peyster v. Clarkson*, 2 Wend. 77, and in other cases cited in the brief of the counsel for the plaintiff in error, and meet our entire approbation.

The decree of the orphans' court must be reversed, and the cause be remanded for another settlement, and that the account may be stated in conformity herewith.

THE STATE v. CRAIG.

1. A judgment *nisi*, on a forfeited recognizance, recited that the recognizance was entered into on "Tuesday, the 8th day of the term." A *scire facias* issued, which pursued this judgment, was served on one of the parties and dismissed, and on motion of the solicitor, another *sci. fa.* was ordered to issue, and leave granted to amend the judgment *nisi*, *nunc pro tunc*; and by the direction of the court, the clerk referred to the judgment *nisi* of the preceding term, and erased therefrom with his pen, the words *Tuesday, the 8th day of the term*, and interlined and substituted, "Wednesday, the 9th day of the term," and a *sci. fa.* then issued on the judgment as amended, returnable to the next term—Held, that the judgment *nisi* was amendable *nunc pro tunc*, and that the particular mode adopted in this case did not annul the first judgment in toto.

Writ of Error to the Circuit Court of Perry.

THIS was a proceeding by *scire facias* against the defendant in error. It appears by the record, that the defendant, at the spring term, 1845, of the circuit court entered into a recognizance with Solomon S. Horton, who was indicted for the murder of James B. Tutt; conditioned for the appearance of Horton at the then next term of the court, under the penalty of four thousand dollars. The transcript recites, that on the 9th day of the spring term of the circuit court of Perry, holden in 1845, being the 6th of May, the cause was

continued, and the recognizance entered into. It also recites, that on the 7th day of the fall term, holden in 1845, being the 3d of November, the recognizance was forfeited, a judgment *nisi* rendered against both the recognizers, and a *scire facias* directed to issue. This judgment, as first rendered, stated that the recognizance was entered into on "Tuesday, the 8th day of the term;" and the *scire facias* pursued the judgment in this respect. The *scire facias* was served on Craig alone and dismissed; and on motion of the solicitor another *sci. fa.* was ordered to issue, and leave granted to amend the judgment *nisi*, *nunc pro tunc*. Thereupon, under the leave thus granted, and by the direction of the court, the clerk referred to the judgment *nisi* of the preceding term, and erased therefrom with his pen, the words "Tuesday the 8th day of the term," and by the same authority interlined and substituted the words "Wednesday, the 9th day of the term." A *sci. fa.* then issued on the judgment as amended, returnable to the fall term of 1846, which was quashed by the court, upon the ground that none had been issued returnable to the next term.

ATTORNEY GENERAL for the plaintiff in error. Upon the motion to quash the last *sci. fa.*, the court should not have looked to the preceding parts of the record; but if the defendant relied upon a variance, or the want of a judgment, he should have cravedoyer and demurred, or pleaded *nul tiel record*. [Ellyson v. The State, 8 Ala. Rep. 273; Chiles v. Beal, 3 Id. 26.] The judgment *nisi* need not recite any other part of the recognizance than the recognizers are required to answer, and a misrecital in any other part is entirely immaterial. [Clay's Dig. 481, § 29, 30; Howie & Morrison v. The State, 1 Ala. Rep. 113; Smith, et al. v. The State, 7 Porter's Rep. 492.]

Even if it be not allowable to look to the first *sci. fa.* for any purpose, still the lapse of a term after a judgment *nisi* and before a *sci. fa.* issued, does not warrant the quashing of the *sci. fa.* [Clay's Dig. *ut supra*; State v. Ellyson, *ut supra*; State v. Pepper, et al. 8 Missouri Rep. 249.] A *sci. fa.* is only the continuance of an action already commenced, [6

Bac. Ab. 103; Arch. Prac. 76; Tidd's Prac. 983;] and a judgment for the defendant on a defective *sci. fa.* is no bar to another *sci. fa.* for the same cause. [Huey's heirs v. Redden, 3 Dana's Rep. 488.]

It was competent to have allowed the amendment of the judgment, if it was necessary to have been made; and the irregular mode in which it was perfected, cannot vitiate the entry *in toto*. [Gov. use, &c. v. Knight, et al. 8 Ala. Rep. 297; Browder v. The State, 9 Id. 58.]

A. B. MOORE and E. W. PECK, for the defendant in error, insisted that the amendment of the judgment *nisi* was irregularly made, and that the authority of the judge to the clerk, could not legalize it; that it was not only unauthorized, but *annulled* instead of perfecting the judgment: *Further*, that the failure to issue a *sci. fa.* to the term next succeeding the entry of judgment, operated a discontinuance, and one subsequently issued was not maintainable.

COLLIER, C. J.—In *Chiles v. Beal*, 3 Ala. Rep. 26, it was decided that the proper mode of taking advantage of the misrecital of a record in pleading, is not by a demurrer, but by the plea of *nul tiel record*, concluding with a prayer that the same may be inspected by the court; and that a variance between the bail bond actually executed, and that described in the *scire facias* was not properly presented, and could not be regarded where the defendant demurs.

Under the act which dispenses with the recital of the recognizance in the *scire facias* and otherwise simplifies the proceeding, it has been held, that the defendant may avail himself of a variance, by craving oyer and demurring, or by pleading *nul tiel record*. [Clay's Dig. 481, § 29, 30; 8 Ala. Rep. 273.] Whether this latter decision applies to the judgment *nisi* as well as the recognizance so as to allow a variance between the former and the *sci. fa.* to be reached in the same way, we will not stop to inquire. And the view which we take of the case relieves us from the necessity of considering whether the variance relied on is so material as to have authorized a judgment for the defendant under any state of pleading.

In the Governor, use, &c. v. Knight, 8 Ala. Rep. 297, it

was held that a judgment *nisi* which did not conform to the recognizance, may be amended *nunc pro tunc*, so that a second *scire facias* might issue after the lapse of a term, and after one issued on the defective judgment, had been quashed. So in *Browder v. The State*, 9 Ala. Rep. 58, it was determined that an irregular judgment *nisi* upon a recognizance may be vacated and set aside even after a *scire facias* has been issued thereon, and the appropriate judgment may be entered *nunc pro tunc*. These citations very fully establish, that a judgment on a recognizance, like all others, is amendable, where the record furnishes any thing to amend by. That there was ample authority for the correction of the judgment in the case before us, cannot be doubted, and the only question is, whether it was made in a proper manner.

Without undertaking to say, that the original judgment was defective, we think that the amendment should have been made by a new entry referring to the original, and the order of the court for its authority. But we are not prepared to say that the erasure and interlineation under the sanction, and in view of the court, annulled the first judgment *in toto*; we are satisfied that it had no such effect, and that there is no rule of law which makes the mode of amendment we have stated, exclusive of all others. The order of court giving leave to amend, and the manner in which it was made, we have said, should have been entered of record. If however, it was not done at the proper time, there could be no objection to perfecting the entries afterwards; and when the motion was made to quash the *sci. fa.* upon the proof made, it was not only competent, but proper, for the court to have directed the appropriate amendment *nunc pro tunc*. We have frequently continued causes in this court, to furnish an opportunity to the defendant in error to ask a correction in the primary court of what would otherwise be a fatal error, and upon the correction being made *nunc pro tunc*, have affirmed the judgment. If this is a regular practice, and it has been long sanctioned by us, upon the authority of other appellate courts,

it requires no extension of the principle to have authorized the criminal court to make the amendment, and overruled the motion to quash.

In Huey's *Adm'r v Reddin's Heirs*, et al. 3 Dana's Rep. 488, it was held that a judgment for defendants upon a defective and insufficient *scire facias*, is no bar to another *sci. fa.* for the same cause. So the neglect of the clerk to issue a *sci. fa.* immediately after its forfeiture, and a judgment *nisi* cannot prejudice the State. It may be issued though a term has intervened. [The State v. Pepper et al. 8 Miss. R. 249.] We think the citations lay down the law correctly; and that the second *scire facias* was issued in due time.

This view is decisive of the case before us. The consequence is, that the judgment is reversed and the cause remanded.

BRANCH BANK AT MOBILE v. FURNESS, ET AL.

1. The circumstance that a creditor has foreclosed a mortgage, and obtained a decree for the sale of the mortgaged premises, does not constitute him a judgment creditor, so as to entitle him to redeem the premises from the purchaser under the act of 1842.

Writ of Error to the Court of Chancery for the eleventh Chancery District.

THE case made by the bill is this:

In December, 1842, the complainant obtained a decree against one Wyman for the foreclosure of a certain mortgage, and the sale of the mortgaged premises. Under this decree, the premises were sold, and purchased by Furness for \$2525. Afterwards, on the 20th October, 1843, a tender was made

to him on behalf of the bank, of the sum thus paid, together with interest thereon at the rate of 10 per cent. per annum, besides all costs, charges and expenses incurred by Furness, and at the same time offered to credit a like sum on the debt of Wyman recited in the mortgage, under which the decree of foreclosure was made, and demanded a conveyance under the terms of the act 1842. Furness then pretended to be a creditor of Wyman, and met the demand with an offer to credit his debt with the same amount. The bank then offered to credit Wyman on the mortgage, the entire sum remaining due—\$5941—and Furness still pretending to be a *bona fide* creditor to a greater sum, offered to make the same credit. The bill then proceeds to charge that Wyman is not indebted *bona fide* to Furness in any such amount, and states facts and circumstances tending to show the supposed indebtedness was either fraudulent or simulated. The prayer is, that a redemption of the premises may be allowed under the statute. There is no assertion in the bill, that the mortgage debt against Wyman has been reduced to a judgment at law.

The answer of Furness asserts that Wyman, at the time of the purchase, and ever since, was indebted to him in a larger sum than offered to be credited by the bank, and that that sum was credited to Wyman, in consequence of the offer by the bank to redeem. Wyman adopts the answer of Furness, and being examined as a witness, establishes the facts asserted by the answer.

The chancellor, at the hearing of the cause on the bill, answers, exhibits and proofs, dismissed the bill on the ground that the mortgage to the bank, being a contract anterior to the act of 1842, was not, nor could be, constitutionally affected by it, and therefore Furness, as purchaser, was not compelled to accept the offer to redeem.

ELMORE, for the plaintiff in error.

J. E. BELSER, contra.

GOLDTHWAITE, J.—One view is entirely decisive of

this cause, without entering upon the question decided by the chancellor, or those which are supposed to be presented by the bill and proofs in addition to it. It does not appear from any allegation in the bill, that the complainant has ever reduced the demand against Wyman to judgment, and having recently held, in the case of *Thomason v. Scales*, *supra*, that none but a judgment creditor is entitled to redeem under the statute, the bill fails on that ground. The circumstance that the complainant has prosecuted his mortgage to a foreclosure, does not place him in any better condition as to the debt, than if no proceedings on the mortgage had been had, as this would not prevent the debtor from interposing the bar of the statute of limitations to a suit on the mortgage debt, allowing that to have run, and possibly too as to any other defence.

Decree affirmed.

THE HEIRS OF HOLMAN, ET AL. V. THE BANK OF NORFOLK.

1. An act of the legislature of this State, authorizing the administratrix of O. H., of the city of Boston, to sell certain real estate of O. H., in the city of Mobile, and requiring a bond to be executed with sufficient security, payable to the judge of the county court of Mobile, for the true and faithful payment of the money arising from the sale into the hands of the administratrix, to be appropriated to the payment of the debts due by the deceased—is not an exercise of judicial power by the legislature, or contrary to the constitution of this State. If in fact the estate was not insolvent, so as to authorize a sale of the real estate by order of the orphans' court, the heirs, on coming of age, may assert title. It does not invalidate the law, that citation was not required to be made to the heirs previous to the sale, and that the administratrix resided in Massachusetts.
2. An allegation in a bill in chancery, brought to perfect the title to land, that B. held the deed of the administratrix, by virtue of a sale made of one-half the property under the authority of the act of the legislature, as cited,

is a sufficient allegation of title in B, without an allegation, that the bond required by the statute to be executed previous to the sale, was in fact executed, and being put in issue by the heirs, those claiming under B, may prove the execution of the bond.

3. The order to examine a co-defendant as a witness, does not ascertain his competency to testify, and if at the hearing, it appears he was interested, his testimony will be rejected.
4. A party improperly made a defendant, and who wishes to be discharged without the payment of costs, must not only disclaim all interest in the controversy, but must also abstain from engaging in the defence of the suit.
5. Neither a remittance of money, to one as the agent of a bank, and his consent to receive it as such, nor his admissions, or the fact that he is a director of the bank, have any tendency to prove that he is the agent of the bank. The consent of the bank that he should so act, is necessary.
6. An agreement by counsel in one suit, of the existence of a fact, is not proof of the fact, in another suit, with which the former has no connection.
7. Depositions taken between the same parties, may be given in evidence in another suit, where the same point is in issue.
8. When the object is not to establish the facts stated by a witness, but to impeach his credit, a deposition made by him in another suit, and between other parties, is evidence to contradict him. The rule of law established in the Queen's case, does not apply.
9. A bill is not multifarious, because it seeks to foreclose a mortgage upon an entire tract of land; and asks a specific performance as to one-half the land, from the heirs of the vendor of the mortgagor.
10. A covenant, by which H bound himself to give B a quit-claim deed to one half a tract of land, (which is described,) "to be executed within two years from the date," is not a contract for the sale of land, within the meaning of the statute of frauds, but is an unconditional promise to convey, by a time stipulated, and is *prima facie* evidence, that the consideration had been paid, or performed.
11. Upon a bill filed by B, or those claiming under him, against the heirs of H., for a specific performance of this contract, B having taken possession under it, the instrument is *prima facie* evidence under the statute, that it was made upon sufficient consideration.
12. A decree may be made against one of two heirs, who submits to the jurisdiction, though the other from *non-residence*, cannot be made a party to the bill.
13. An allegation, that a mortgagor was seized, or pretended to be seized in fee simple of the land, when he executed the mortgage, is a sufficient allegation that he was in possession.
14. Objections to a bill of revivor, that notice was not given of the intended application to the register, must be made in the first instance to the chancellor, or they cannot be raised in this court.
15. Proof by old residents of Mobile, who had resided there before, and since

the execution of the deed, that they never knew or heard of such persons as the witnesses to the deed in this State, is *prima facie* sufficient, to prove non-residence, and let in the secondary evidence.

16. A mortgagee may release a part of the mortgaged estate, from the operation of his mortgage, without impairing his right to look to the residue ; and this, although subsequent to the mortgage, the mortgagor had transferred a part of the estate to others. Whether equity would not grant relief on the ground of fraud, if the mortgagee should collude with the mortgagor, to make the burthen fall on a sub-purchaser of the mortgagor, *Quere.*
17. *Non-residents* may be made parties to suits in chancery, whether infants, or adults, by publication, when the contract out of which the suit arises, is made in this State, or when any act is done by the non-resident in this State, justifying the interference of chancery, or when he asserts title to property in this State, in virtue of some act or transaction, which took place within this State.

Appeal from the Chancery Court of Mobile.

THE bill was filed by the appellees, to foreclose a mortgage executed, to-wit, on the 29th March, 1828, by Charles Brown and wife, on certain property in the city of Mobile, to secure the payment of \$20,000, evidenced by three promissory notes of \$6,666 67 each, dated 29th May, 1828, payable at one, two, and three years, the interest being payable *semi-annually*. The estate mortgaged is particularly described in the bill, the mortgage having been duly recorded.

The bill was filed on the 20th March, 1834, and subsequently, a decree *pro confesso* was taken against Brown and wife.

Considerable delay appears to have taken place, and the report of a master was made, showing, that several other persons claimed an interest in the land mortgaged, by conveyances from Brown, and finally, at the March term, 1842, by leave of the court, the complainant filed a supplemental bill, in which, after reciting the substance of the original bill, it states, that Brown, subsequently to the mortgage, conveyed a certain portion of the mortgaged estate to Sheffield & Barney, and believing that the residue of the mortgaged estate, was sufficient to secure the debt, at the instance of Brown, and Sheffield & Barney, the bank executed to Brown,

a release of all the estate so conveyed to Sheffield & Barney.

That Brown afterwards, on the 1st May, 1831, mortgaged said premises to one Charles Copeland, and afterwards, on the 23d September, 1832, conveyed said premises to him, by deed in *fee simple*. That Copeland, on the 2d May, 1834, conveyed by deed a certain portion of the premises, to Remsen & Jude, and on the 15th April, 1835, another portion to James W. Roper—on the 1st September, 1835, another parcel to John W. Mott and Charles E. Thompson—on the 28th August, 1835, another parcel to John J. Morrell—on the 1st September, 1835, another parcel to Thomas Mather—on the 2d February, 1836, another parcel to E. Baker; which said several parcels embraced all the real estate mortgaged by Brown and wife to complainant.

That Remsen & Jude, conveyed all their interest to Bartlett & Waring, who are now, together with E. L. Anderson and Joseph Wiswall, in possession of all the estate conveyed to Remsen & Jude. That Mott & Thompson have conveyed their interest to Woodruff and Watkins, who are now in possession thereof. That Thomas Mather has departed this life, and Olivia, his widow, has administered upon his estate, and has intermarried with Edward McKinstry. That the remainder of said estate is in possession of, and claimed by Olivia Holman, and Agnes Howard, a minor, Eliphalet Baker, Harriet and Eliza Judson, Seaborn Travis, Olivia A. McKinstry, and Edward McKinstry, as the representatives of Thomas Mather, Mills Judson, Waldon B. Post, Nehemiah Denton, Nehemiah Wilkins, heir of Samuel Wilkins, now a minor, and Gorham Davenport, all of whom claim to have some interest in said mortgaged premises.

The bill charges, that all the lands so conveyed by Copeland, are subject to the mortgage, and that no part of the mortgage money has been paid by Brown, except the interest on the note first due, to the 1st April, 1833, \$495, on the 22d July, 1829, \$2168 78, on the 29th June, 1830, \$987 50, on the 14th February, 1830, \$883 33, on the 23d June, 1831, and on the same day, \$1766 67. On the second note interest has been paid to the 1st April, 1831, and on the third

note, interest has been paid to the 1st April, 1833; all of which are credited on the notes.

That reposing in the honor and integrity of Copeland, who had purchased the property subject to the mortgage, and at his urgent request, complainant entered into a contract with him, on the 25th January, 1834, by which the bank agreed to transfer all their interest, by quit claim deed, upon his payment of the mortgage debt, with all costs, &c.; which agreement is made an exhibit to the bill.

That the payments described as made on the principal sum of the first note, were made by Benjamin Copeland, who during that period, was a director of the Bank of Norfolk, and continued so, until some time prior to the filing of the bill; that Copeland received and paid the said sums by the directions of Brown. That in addition to the sums so received, they received the sum of \$2104, arising from the rents of the mortgaged premises, but that Copeland claimed the same, as rents accruing to him subsequent to his purchase, and upon legal advice, paid the same over to him on the 5th November, 1833. It is expressly alledged that Copeland has never paid any money on account of the mortgage, except as above set forth, and that he has no other interest in the mortgage than as stated.

The bill further charges, that the estate mortgaged, was acquired by Brown, from one Oliver Holman, now deceased, who in his life-time, to wit, on the 29th September, 1821, executed to Charles Brown his obligation, covenanting to convey to said Brown, one-half the land he had purchased from McKenzie & Swett, which are the same lands conveyed by Brown in his mortgage to the bank. The covenant is made an exhibit to the bill, and is as follows:

“Know all men by these presents, that I, Oliver Holman, do hereby bind myself, to give Charles Brown, my quit claim deed of one-half part of all the land, which I purchased from McKenzie & Swett, in the city of Mobile, on the 28th January, 1818, (except one certain piece, or parcel of land, lying, being, and situate, in said city of Mobile, and bounded as follows: commencing at Water street, running eastward on the flats of Mobile river seventy feet, thence southward to Holman & Brown’s wharf thirty-five feet, thence westward

Heirs of Holman, et al. v. Bank of Norfolk.

by Holman & Brown's wharf seventy feet to Water street so called, thence northwardly by Water street to the first mentioned boundary thirty-five feet, be the same more or less. Also one other piece, or parcel of land, lying and being situate in the city of Mobile, and bounded as follows: commencing at Water street, east, by Holman & Brown's wharf seventy feet, south thirty-five feet, to premises of Daniel Paul, thence westwardly to said Paul's premises, to Water street seventy feet, thence by Water street north to the first mentioned boundary thirty-five feet, be the same more or less. Both of the said pieces of land, I do not deed to the said Charles Brown,) together with the buildings thereon. Also the wharf, with the reservation of passing to and fro, for the distance upon said wharf, to my buildings, in case I should have any on my land; this deed to be executed within two years from the date, if the said Charles requests.

"In virtue whereof, I the said Oliver Holman, has hereto set his hand and seal, this 29 Sep'r, 1821.

Witness,

OLIVER HOLMAN, [seal.]

John Holman,

Abram Holman."

Complainants alledge, that Brown complied with, and performed all the covenants on his part to be performed, and that before the time for making a deed, O. Holman departed this life, viz., in the summer of 1822, and that Sarah Holman, his widow, and Oliver Holman, and Agnes Howard, are his representatives and heirs at law. That after the death of Oliver Holman, the said Sarah took out letters of administration upon the said Oliver Holman's estate, and by authority of an act of the legislature of the State of Alabama, the said administratrix conveyed by deed to the said Charles Brown, all the interest of said Oliver remaining in said estate, purchased of McKenzie & Swett, for the sum of \$——; a copy of which deed is made an exhibit, and which is exclusive of the interest covenanted to be conveyed by Holman to Brown.

The bill further charges, that the heirs of Holman, by collusion with some of the purchasers from Copeland, have entered into, and have possession of certain portions of the premises, and are in the enjoyment and receipt of the rents, and that they are wholly insolvent and irresponsible. That

owing to the destruction by fire, of much of the valuable improvements, the security intended to be afforded by the mortgage is impaired.

That since the report of the master, ascertaining the sum of \$24,357 26, to be due upon the mortgage, no further payment has been made.

All these persons are made parties, the prayer of the bill is, for an account and foreclosure of the mortgage—that the heirs of Holman be decreed to make such deed, as their ancestor was bound to make, and that the premises be sold for the payment of the mortgage debt, unless otherwise satisfied.

Sarah Holman, the widow of Oliver Holman, answered the bill, and disclaimed all interest in the estate in controversy.

Oliver Holman also answered the bill, and admitted that he, in conjunction with Agnes Howard, was in possession of two lots, part of the land covered by the mortgage, but denies all collusion, having recovered them by suit at law, as the property of his ancestor, from those in possession. He admits that his ancestor died in 1822, seized in fee of the premises—that afterwards, in 1823, G. Davenport and N. Littlefield, represented that his ancestor was indebted, and in December, 1823, the legislature of Alabama passed an act to authorize the administratrix of O. Holman to sell his real estate. That Sarah Holman was administratrix in Massachusetts, but not in Alabama. Is ignorant whether the bond required by law to be given by Davenport and Littlefield was given, or not, but admits that under color of this act, they conveyed an undivided moiety of the premises claimed by the mortgagee to C. Brown. But he denies that Brown ever paid to the administratrix \$15,500, the consideration mentioned in the deed, or any other sum for his purchase, although he stipulated to pay her a certain sum, and paid her in part for her dower interest.

As to the other undivided moiety, he has never seen the bond, and is ignorant whether the same was in fact executed by his ancestor, and if it was, what were the terms, and conditions which were to be performed by Brown, and whether performed or not, and submits that these facts must be

proved by him, before he can derive any benefit from the bond.

Admits that Brown, in 1824, claiming under the said supposed bond, and under the deed made under the act aforesaid, took possession of the land, and executed the mortgage, and the other conveyance mentioned in the bill, but denies that the mortgage in any manner affected his title, which vested in him by descent.

That O. Holman, the elder, and Brown were partners in trade, in the course of which they had contracted debts to a considerable amount, many of which are still unsettled. That the said Brown had always resided at Boston, and as surviving partner took possession of the assets, and persuaded the administratrix to let him have the control of the individual assets; representing that from the rents he could pay off the debts, and would then reconvey the land to her, and her family. That she consented, and agreed, that the application should be made to the Alabama legislature for power to sell the land.

That after the conveyance was so made by the administratrix, to Brown, he mortgaged the whole estate to certain persons, upon a loan of \$20,000, and the administratrix received from Brown a stipulation in writing, by which he bound himself to reconvey the half so sold; that when the mortgage was discharged, he would reconvey the said real estate. Yet, although satisfied from the rents, and profits, he did not convey either to the heirs, or the administratrix, or render her any account of the same, and suddenly left the United States, having conveyed away the whole of said property to other persons. He denies his responsibility to account; insists that the bill is multifarious, because it seeks to foreclose, and sell the premises, as against all the defendants, and calls on the administratrix, and heirs of Holman to execute deeds, and render an account, in which the other defendants have no interest. He also demurred to the bill.

Agnes Howard, a minor, answered by her guardian *ad litem*, putting the complainant on proof. Other defendants answered the bill, and the bill was taken as confessed as to the rest. Those who answered, deny the right of complain-

ant under the mortgage, and call for proof ; they also demur to the bill.

Morrell, in his answer, states, that previous to his purchase, he called on the bank, and the bank disclaimed all interest in the premises, whereupon he completed his purchase, and insists that the suit the bank is now prosecuting, is for the benefit of Copeland. He denies also the validity of the conveyance from O. Holman, the elder, to Brown, and states his belief, that the whole debt due the bank, has been paid. He disclaims all interest in this controversy, having sold by quit claim deeds, and demurs to the bill.

Leave was given to examine Morrell as a witness, subject to all legal objections.

Sarah Holman, by a supplemental answer, admitted she had conveyed her dower interest to Charles Brown.

A great mass of testimony was taken, which, so far as it is important, will be found in a condensed form, in the opinion of the court. The cause coming on to be heard at the April term, 1846, the chancellor overruled the exceptions taken to the complainant's testimony, and sustained those taken to the testimony of the defendant, and decreed, that the premises contained in the mortgage, were subject to the mortgage debt, except the portions conveyed to Remsen & Jude, and to Sheffield & Barney. He further decreed, that the bond of O. Holman, to C. Brown, which was proved as an exhibit, was valid, and that the heirs of Holman be perpetually enjoined from asserting any claim to the same, as against the bank. He further decreed, that the conveyance from Sarah Holman, to C. Brown, under the act of the legislature, was a valid, operative, conveyance, and the estate of the heirs of Holman therein divested. He further referred the matter to the master, to take an account of what was due the bank, and to determine the order in which the premises should be sold. From this decree an appeal was allowed, which by consent was prosecuted pending the account.

The appellants assign for error—

1. In overruling the demurrer to the bill.
2. The court had no jurisdiction.
3. It had not jurisdiction of the non-resident defendants.

4. The necessary parties are not before the court.
5. In decreeing against the minor defendants.
6. In declaring the property subject to the mortgage.
7. In sustaining the bill against the heirs of Holman.
8. In sustaining the complainant's objection to the defendants testimony.
9. In overruling the objection to the defendant's testimony.
10. In declaring the mortgage a *lien*, when its satisfaction was shown by the proof.

ADAMS & SEWALL, for appellants, argued the cause at great length, but no note was preserved of it. HOPKINS, on the same side—

The complainant claims the specific performance of a covenant made by O. Holman, deceased, in favor of Brown, his mortgagor; if such a decree should be made, the title to half the real estate in controversy would be divested out of the heirs of O. Holman, and vested in the complainant.

There is no allegation in the bill, that Brown gave any consideration for the alledged covenant to O. Holman. The answer of Holman, the heir, does not admit, but denies that any consideration was paid, or agreed to be paid, to his father, for the covenant. The covenant therefore, is within the statute of frauds, because one term of a valid agreement, the price or consideration, is not contained in the covenant. A specific performance of a written agreement for the sale of real estate which does not contain the price, cannot be decreed, because it does not contain, as the statute of frauds requires, the whole agreement, and is therefore void under that statute. [2 Story's Eq. 22, § 715; 53, § 751; 54, 60; 69, § 767; 76; Adams v. McMillian, Ex'r, 7 Porter's Rep. 73, 83, 84; 12 Vesey, 469; Blagden v. Bradbear, 3 Bingham's R. 107; Morely v. Boothby, 1 Eng. Com. Law Rep. 53, 56; 11 Pick. Rep. 439; Brooks v. Wheelock, Story's Eq. Pl. § 503; Cooper's Eq. Pl. 166, 167; 1 Johns. Ch. Rep. 274; Parkhurst v. Van Courtlant, 6 Gill & Johns. 439, 440; Griffith v. Frederick C'ty Bank; Newland on Contracts, 307 to 310; Bligh Rep. 49, 50; 4 Pick. Rep. 1; 40 Law Lib. 48; Kennedy v. Lee, 3 Meriv. 440.]

The object of the statute of frauds is to prevent perjury. To attain this object it is more necessary to require that the consideration of an agreement should appear in writing than any other term or condition of the agreement. [3 Bingham's Rep. 107; 11 Eng. Com. L. Rep. 56; 7 Porter's Rep. 83; 1 Chitty's Prac. 118, 293, 827, 828.]

If the bill, for the purpose of aiding the defective written agreement, had stated there was a consideration, and the amount of it, and had shown also that the amount of the consideration was no part of the agreement, but could be proved by oral evidence, the court would have no authority to decree a specific performance. If the written agreement had stated that it was upon a valuable consideration paid by Brown to O. Holman, without stating the amount of it, the agreement could not be enforced in equity, as oral evidence would not be competent to prove the amount of the consideration. [11 Eng. Com. L. Rep. 56; 7 Porter's Rep. 83-4.] If a consideration could be implied, because the agreement is contained in a covenant, the consideration implied from the written agreement is uncertain in amount, and oral evidence is no more competent to prove the amount, than it would be to prove the amount of a consideration stated in a written agreement, but the amount of which consideration was not expressed.

If the consideration, and the amount of it, had been stated in the bill, as these things do not appear in the written agreement, they could not be proved by oral evidence, as they are not admitted by the heirs of O. Holman, in their answer. [2 Story's Eq. 76.] If such allegation had been made and admitted, the complainant would not be entitled to a specific performance of the agreement, as the statute of frauds is insisted on by the heirs. [Ib. 60.] The covenant, as an exhibit, forms part of the bill, and it may therefore be contended, that there is an implied consideration shown by the bill, but the amount of such consideration is not stated in the bill. If, therefore, oral evidence of the amount of the consideration were competent, instead of being incompetent, and the amount of the consideration had been proved by oral evidence, or the answer of the defendants, the complainant could have no relief founded upon such evidence, or ad-

mission, because the amount of the consideration is not alleged in the bill, and a complainant is no better entitled to relief upon evidence, without a material allegation in the bill, to be proved by such evidence, than on such an allegation in the bill without proof of it. [3 Porter's Rep. 473; Morgan, Ex'r, v. Crabb, 10 Wheat. 189; 3 Littel's Rep. 339; 3 Ala. R. 718; Borland v. Phillips, Story's Eq. Pl. § 264.]

The authority of the court to decree a specific performance is discretionary, and independently of the statute of frauds, equity requires a complainant to entitle himself to a specific performance, to alledge and prove an adequate consideration for the agreement. That it may appear to the court to be adequate, the amount must be stated in the bill. [2 Story's Eq. 54, 64; 11 English Com. L. Rep. 56; 2 Ala. R. 86; Gould v. Womack and wife, 3 Cowen, 445; Moore v. Delancey, 6 Johns. Ch. Rep. 225; 2 Bibb, 78; 4 Johns. Ch. Rep. 500; 3 Bibb, 29.] The amount of the consideration was neither stated in the bill, nor proved upon the hearing. [7 Porter's Rep. 83.]

As the right to a specific performance depends upon the adequacy of the consideration, the amount of it, to show the court that it is adequate, is a material allegation in the bill, and as the agreement is in writing, without a statement in it of the consideration, and the amount of it, oral evidence would be incompetent to supply the omitted statement. Independently of the effect of the statute of frauds upon the covenant, the law of evidence would exclude parol evidence to prove an essential term, the consideration of the agreement, as the effect of such evidence, if it were admitted, would be, to add to the written agreement. [11 Eng. Com. Law Rep. 56; 7 Porter's Rep. 84.]

In an action at law upon a bond, the rules of pleading do not require the amount of consideration to be stated. In declaring upon a bond, the consideration is in effect stated in the declaration, as the fact, the sealing of the instrument, is stated, from which the law would imply a consideration. Since the existence of the statute law, which makes any written instrument, without seal, *prima facie* evidence of the debt or duty, for which it was given, the same rule applies

to the declaration, and a consideration is in effect stated, by declaring upon an instrument which import a consideration.

As a valuable consideration, regardless of its amount and adequacy, is sufficient to maintain an action at law, upon any of these instruments, the statement in a declaration of a bond or note, either of which imports a valuable consideration, is an averment of all the consideration which the rules of pleading require in a declaration. The statute of frauds has not changed the rules of pleading. It is still sufficient to declare upon a bond, or a promise in writing, to show in the declaration such a consideration as the rules of law require. But although the amount of the consideration which the bond or note imports, need not be stated in the declaration, yet, since the statute of frauds, there can be no recovery at law, upon a written agreement for the sale of lands, in which the price is omitted, where the statute is pleaded. The defect in the plaintiff's evidence, in such a case, would prevent a recovery. [7 Porter's Rep. 83, 84, 86] 11 Eng. Com. Law Rep. 56.]

But the rules of pleading in equity require that every material fact of which the case of the complainant consists, should be alledged in the bill. There can be no proof heard of a fact which is not alledged. Before the statute of frauds, as well as since, equity would not decree a specific performance of the contract, unless not only a valuable, but an adequate consideration for it were alledged in the bill. It could not appear to the court to be adequate, unless the amount of it were stated in the bill. Since the statute of frauds, the amount of the consideration, as well as every other term of the contract, must be in writing. If the written contract omits the amount of the consideration, the defect cannot be supplied by parol evidence. The covenant of Holman to Brown is an exhibit to the bill, and is therefore a part of it. The covenant contains no statement of the amount of the consideration. The bill therefore shows no right to a specific performance. There is not parol proof in this case, that the consideration of the covenant was adequate. There is no other proof of consideration than what the covenant imports, and the covenant itself was not proved by competent evidence. Belief is a state of mind produced by evidence, and

the belief of the witness, that the subscribing witnesses to the covenant, resided in Massachusetts, without stating any fact which caused the belief, is not evidence of the non-residence of the subscribing witnesses. In actions at law, not founded upon any written instrument, the consideration must be fully stated in the declaration. If any part of a consideration, consisting of several things, be omitted in the declaration, the plaintiff will fail upon the trial, on the ground of variance. [1 Chitty's Pl. 293, 294.] In relation to written instruments, which are neither bonds, negotiable notes, nor bills of exchange, the rule just mentioned has been changed by the act of 1811, and the rule of the common law applicable to declarations on bonds, notes and bills, which import a consideration adopted for declarations on instruments, that did not import a consideration at common law. The rule of pleading in equity, in cases like this, has always required an allegation of the full consideration of any instrument, sealed or unsealed.

The averments in a declarations must be supported by proof. If a sealed instrument be declared on as such, if the plea put it in issue, or oyer be craved, and it be set out upon the record, and have no seal, the plaintiff must fail upon a demurrer. If the cause of action be on a verbal contract, the plaintiff must aver the full consideration, and prove it upon trial, if it be denied by the plea. For a specific performance, equity requires an adequate consideration. The amount of it is therefore a most material allegation in the bill, as there is no case where a decree for a specific performance can be had, upon mere proof that there was a valuable consideration. It must be proved also, that the consideration was adequate. But in actions at law, upon written instruments, the plaintiff can recover, if the consideration be not impeached, by a plea upon the mere proof of valuable consideration, which such instruments import.

The complainant neither alledges any amount as the consideration of the covenant, nor proves any, to show the court that an adequate consideration was given, by Brown, for the covenant.

Upon the principle heretofore stated, it is necessary to allege a consideration, and the amount of it, in a bill for a spe-

cific performance ; but if this had been an action at law, and a consideration had been denied by plea, and the statements in a plea, when responsive to a declaration, were evidence, as an answer responsive to a bill is, the statement of a consideration by stating an instrument which imports a consideration, would be disproved by a plea denying a consideration. In this case, the consideration stated in effect, in the bill, as it may be contended by stating the covenant, which imports a consideration, is denied by the answer of Holman, which is responsive to the bill, and is sworn to, against the denial of the answer, there is no other evidence than the covenant. The evidence of consideration which the covenant imports, is put in issue, and disproved by the answer.

In the case of *Adams v. McMillan*, ex'r, 7 Porter, 73, 83-4-5-6, this court determined, that an agreement in writing, for the sale of land, which imports a consideration, under the statute law—but in which the price was omitted, is void at law, when the statute of frauds is pleaded. That statute is pleaded in this case. [For the English statute of frauds, see *Roberts on Frauds*, 125, and for the statute of frauds of Alabama, see *Aik. Dig.* 206.]

The amended answer of Holman states, that if any consideration were given to O. Holman for his covenant, it was the obligation of Brown to perform the covenants undertaken by him, in an agreement of the same date of O. Holman's covenant, between O. Holman and himself, which is an exhibit to the supplemental answer of Holman. The agreement was not proved, as the depositions which had been taken to prove it, were excluded upon the motion of the complainant. The amended answer states that none of the covenants entered into by Brown were performed by him. If this answer were responsive to the bill, it would be taken altogether, and show that no consideration was given for the covenant, which forms part of the bill, as the covenants of Brown in the other agreement, the performance of which was to be the consideration of the covenant of O. Holman, have not been performed. But the agreement referred to by the amended answer of O. Holman, is not alledged in the bill, as the consideration of the covenant set up in the bill. If therefore, the performance by Brown of his covenants contained in the agreement,

had been proved, or admitted, in the supplemental answer, the complainant could take nothing from such proof, or admission, because such covenants, and the performance of them by Brown, as the consideration of the covenant of O. Holman, are not alledged in the bill. [Story's Eq. Pl. § 264 ; 3 Porter's Rep. 473 ; 10 Wheat. Rep. 189 ; 3 Ala. R. 718.]

The answer of Agness Howard, the other heir at law of O. Holman, does not set up any agreement between him and Brown.

If the covenant were a valid agreement within the statute of frauds, the specific performance of it is barred, both by the lapse of time and the statute of limitations.

There is no allegation in the bill that there was a partnership between O. Holman and Brown ; none that the firm of Holman & Brown was insolvent, or that the estate of Holman was insolvent. There is no statement in the bill that the act of the legislature of Alabama, under which the agents of O. Holman's widow sold the other half the real estate, required her or them to do any thing to give them authority to sell the real estate of O. Holman. If all these things had been proved, the evidence would be without the effect of proof, in favor of the complainant, and give no right to a decree against Holman's heirs. It is not alledged in the bill, that the agents of Mrs. Holman made any bond, with sureties, before they sold the real estate under the act of the legislature. Yet the chancellor erroneously admitted upon the hearing, proof against the objection of the defendants, that the agents did give their bond with sureties, as the act required, before the sale. [Story's Eq. Pl. § 264 ; 3 Porter, 478 ; 10 Wheat. 189 ; 3 Ala. Rep. 718.]

Upon the death of O. Holman, his real estate in Alabama descended to his heirs at law, and they could not be divested of it, according to the laws of this State, when the descent was cast upon them, without a judgment, or decree, in a judicial proceeding, in which they would have a right to be heard in support of their claim to the estate. [4 Ala. Rep. 681, 682 ; Lucas v. Price, ———, 752 ; Mansony & Hurtel v. The United States Bank, 5 Ala. Rep. 324 ; Cummins & Cooper v. McCulloch, Id. 503 ; Fitzpatrick, et als. v. B. & W. Edgar, 8 Porter, 389, 401.]

The act of the legislature, under which the sale was made, was unconstitutional and void, because it attempted to give, in effect, authority to third persons, to ascertain that debts were due from O. Holman, deceased, for which the real estate that had descended upon his heirs, was liable, and to sell it for the payment of any creditor Mrs. Holman might prefer. [4 New Hampshire Rep. 572-3; 10 Yerger's Rep. 69; 1 Gill & Johns. 463, 475; Crane v. McGennis.]

Mrs. Holman never was a personal representative of O. Holman, under the authority of Alabama. She did not reside in this State, but was a citizen of Massachusetts. The bill does not alledge by what State she was appointed administratrix. If it should be held, that the effect of the bill is to show, she was appointed by the authority of Alabama, the answer of Holman denies the appointment by this State, and alledges she was appointed by Massachusetts. The proof of the complainant shows she was appointed by the authority of Massachusetts only. The act of the legislature of Alabama did not appoint her administratrix, but described her as an existing administratrix. The real estate in Alabama did not constitute assets in the hands of the Massachusetts administratrix. [9 Mass. Rep. 395; 8 Porter's Rep. 401-2.] If Mrs. Holman had come into this State, she could not have been sued as administratrix. [Story's Confl. Laws, 421-2.] She was not liable, therefore, for the proceeds of the sale of the real estate in Alabama, to the authority of Massachusetts, nor to the authority of Alabama, as she is not an administratrix appointed by Alabama. She gave no bond, nor was she required to do so by the act, to account to the authorities of this State, for the proper application of the proceeds of the sale. Her agents were required by the act, to give a bond before the sale, to pay the proceeds of it to Mrs. Holman, a non-resident of Alabama, and a citizen of another State.

The personal property of the intestate, is the fund, in this State, which is first chargeable with his debts. [Aik. Dig. 151; 3 Stew. & Porter's Rep. 27; 3 Porter R. 10, 31, 38; 3 Ala. Rep. 61, 64; 2 Ala. Rep. 660.]

The real estate descended to Holman's heirs, subject to the power in the orphans' court of the county in which it lay, to

order a sale of it in the following cases: 1. Where the estate of the intestate was insolvent. 2. Where the personal property was insufficient to pay his debts. 3. Where it would be more beneficial to the heirs, to sell real estate than personal property, for the payment of the debts. 4. Where the real estate could not be beneficially divided among the heirs. In the three last cases, all persons interested, are required by the statute law, to be made parties, actually, to the proceeding. The case first mentioned, is a proceeding *in rem*, to which all interested are legally parties, and may become actually so. [2 Howard's Rep. 338; 6 Porter's Rep. 219, Wyman and others v. Campbell and others; Aik. Dig. 154, § 8; 156, § 17; 180, § 16; Clay's Dig. 192, § 2; 225, § 23, 25.]

The source of the authority of an orphans' court to order a sale of real estate, is in the statute law, and the judgment of such court, formed upon competent evidence, that one of the cases exists, in which it is authorized to decree a sale.

The exercise of this power by an orphans' court, is no greater interference with the inheritance, than that which is exercised by a court of chancery, when it decrees a sale of real estate, that an ancestor had mortgaged, which had descended to his heirs. Such power is exercised upon the judgment of the court, that there is an unpaid debt, and that the mortgage was made to secure it. If such a mortgage were made to secure several debts, and every one that the mortgagor owed at the time of his death, this fact would not authorize the legislature to pass an act, giving authority to a citizen of another State, or the administrator appointed by Alabama, to sell the mortgaged premises and pay the debts. The petition of the mortgagees for such an act, could give no validity to it. The title of the heirs could only be divested in some mode in which the object could be accomplished by the exercise of judicial power. The power to divest the heir of the title, which descended upon him, belongs to the proper court, and must be exercised upon its judgment, in a proceeding in which the heir may have an opportunity of being heard, that there is a debt due from the mortgagor, for which the estate is liable in the hands of the heir. [4 Ala. R. 752; 1 Ib. 725-6.]

If there had been a judgment in some court in this State against O. Holman, at the time of his death, an execution issued upon it after his death, would have been void, and a purchaser under it, would have acquired no title against his heirs. [4 Ala. Rep. 752, 681.]

The lien of such a judgment, might be preserved by suing out a *scire facias* upon the judgment, against the heir, and personal representative of the deceased debtor, before the personal representative had reported the estate insolvent. A report of the estate of a deceased debtor as insolvent, by his executor or administrator, before a judgment creditor sues out a *scire facias* against the heir and personal representative of the debtor, destroys the lien of such judgment. Such a report, by operation of law, divests the estate out of the heirs at law, and vests it in the personal representative for the purpose of equal distribution. [Fitzpatrick and others v. B. & W. Ogden, 5 Ala. Rep. 499, 503.]

The personal property of a deceased debtor is, according to the law of Alabama, the appropriate fund for the payment of his debts, and when it is insufficient to pay them all, the personal representative may, and ought to report the estate insolvent. [Woods v. McCann & Witherspoon, adm'rs, 3 Ala. Rep. 61, 64.]

When the inheritance is cast upon the heirs unincumbered by any specific lien, created by the ancestor, as by a mortgage, their title to it can be divested to pay the debts of their ancestor, upon the application only of his personal representative, and the order of the proper orphans' court to sell it. The personal representative has no right to apply for such an order, but in virtue of a previous report by him of the estate as insolvent. [3 Ala. Rep. 64; 4 Ala. Rep. 682.] In such a proceeding, the title remains in the heirs, after an order for a sale, until the court decrees a title to be made to the purchaser, and a title is in fact made. [Cummings & Cooper v. McCullough, adm'rx, 5 Ala. Rep. 324.] It is the settled law of Alabama, that the title of the heirs cannot be sold and transferred to purchasers, for the purpose of paying the debts of their ancestor, without a decree of the proper orphans' court, directing the sale of it, and to the proceedings in which such a decree may be rendered, the heirs are constructively,

or actually parties, and therefore cannot be divested of their title without a judicial proceeding; and an opportunity of being heard, as this court decided in the case of *Mansony & Hurtell v. The U. S. Bank*, 4 Ala. Rep. 752.

The death of the ancestor transfers the title, by operation of law, to third persons, as a deed conveying the fee from a grantor to grantees does. Against the latter, liens existing against the estate, at the time of the conveyance, in mortgages made by the grantor, or unpaid purchase money due from him, of which his grantees had notice, cannot be enforced without the exercise of judicial power, in the proper proceeding, to which the grantees must be parties, and may have an opportunity of being heard. If the legislature, without any knowledge of the number, nature or amount of these different liens, were to pass a law, upon the application of a person who claimed no interest in the matter, authorizing such person to sell the estate, and apply the proceeds of the sale to the payment of the debts of the grantor, who would attempt to maintain the validity and constitutionality of such a statute, or that the title of the grantees had been divested or impaired by the sale? No validity could be acquired for such a statute by proof that the legislature acted in passing it, upon evidence that unsatisfied liens existed against the grantor, at the time of his conveyance, to more than the value of the estate. A sale under such a statute would be liable to several fatal objections. It would be without the support of a judgment, or decree of a court of competent jurisdiction, which authorized it, after ascertaining the existence and amount of the liens, in a proceeding to which the grantor and grantees were parties. The validity and amount of the liens would be determined by the private judgment of the legislative agent. In the distribution of the proceeds of the sale, he might reject valid liens, and allow groundless or satisfied claims, and from his judgment there could be no appeal. The title of the heirs was as completely and firmly vested in them by the death of their father, the intestate, as any title can be in a grantee by the conveyance under which he claims. There were no mortgages on the inheritance made by O. Holman. There were no judgments against him, nor other specific liens upon the estate when the de-

scent of it was cast. If O. Holman left creditors at large, their demand could not affect the real estate in the possession of the new owners, the heirs at law, who did not owe the debts, without the judgment of the proper orphans' court, at the suit either of the personal representative of Holman, in the mode which has been already noticed, or of some creditor, under the act of 1828. [Aik. Dig. 156, § 17.] The act under which the sale in this case was made, directs the proceeds of the sale to be applied to the payment of the debts due from O. Holman, the ancestor. The act does not affirm that the personal property of O. Holman was insolvent, that it was necessary to sell the real estate, in aid of a personal property insufficient to pay the debts, or that it would be more beneficial to the heirs to sell the real estate than the personal property, for the payment of the debts. The act, therefore, does not show the existence of any case in which even the proper orphans' court could have decreed the estate to be sold. The act, in the absence of any person who claimed to be a creditor of O. Holman, deceased, of his heirs, and of any personal representative appointed by Alabama, insinuated that debts might be due from O. Holman, and left it to an individual who was a citizen of another State, to determine whether debts were due from a former owner of the estate. If it did not appear to that individual that such debts were due, there would be no authority to sell the estate, as it could be sold under the act only to pay such debts. It was therefore left to the legislative agent to determine whether such debts were due, and if in her judgment debts were due, she was authorized to have the estate sold, and apply the proceeds to the payment of such claims as she allowed. From her judgment, rejecting or admitting claims, as debts, there could be no appeal. The act intended, that the title of persons who owed no debts, should be sold by an individual upon her private judgment, that debts were due from a former owner of the same estate, and the proceeds applied to the payment of such of the creditors of the former proprietor as she might recognize. The evidence shows the sale was made to Brown, who paid no money, as the act required.

The debts of the ancestor not in judgment against him at the time of his death, cannot be charged upon the real estate

which descends upon his heirs, till the proper orphans' court approves of a report made by the personal representative, that the personal estate is insolvent, and such a report he is authorized to make, if the personal property be insufficient to pay the debts. [3 Ala. Rep. 61; 4 Ib. 681-2, 752; 5 Ib. 324, 503.]

The approved report divests the heirs of the title, and vests it in the personal representative, to pay the debts. After the report shall be approved, all the debts must be presented, and the amount of each ascertained, under the authority of the proper orphans' court in Alabama. The title of heirs to real estate in Alabama cannot be divested, but upon a report of the estate as insolvent, made by a personal representative, appointed by the authority of Alabama. A foreign executor or administrator, has no authority to report an estate insolvent, to an orphans' court in Alabama, and obtain an order to sell real estate. For the extent of his authority, and the terms upon which he can obtain it, see Clay's Dig. 227, § 31. A report of insolvency divests the title of the heirs, not absolutely. Should it turn out that the real estate is not absolutely needed for the payment of the debts, the title will be restored, by operation of law to the heirs. After the report of insolvency, the personal representative cannot sell the estate without the authority of the proper orphans' court. It would be a violation of his duty, to pay afterwards a debt alleged to be due from the ancestor, which had not been allowed under the authority of the orphans' court. He succeeds to the personal property upon the death of the ancestor, and before such a report, he has a right to determine that a claim is a just demand, and pay it out of the personal property; but he has no authority to pay debts upon his own judgment that they are just, out of the proceeds of the sale of real estate. He can pay out of such proceeds such debts only as may be admitted to be just by the authority of the orphans' court. The report makes the personal representative a trustee of the real estate—first for the creditors, who may be recognized as such by the orphans' court, and next for the heirs. This trust fund cannot be employed in the payment of debts, but upon a judicial proceeding, to which the creditor is an actual party, by presenting his claim to the

proper court, to which the trustee is an actual party, and to which the heirs are constructively and legally, and may become actual parties.

The heirs acquired from descent such a vested estate as their ancestor had. A debt of their ancestor can no more affect their title than a debt of their own, without a judgment or decree of some judicial tribunal. If one acquires an estate by purchase from another, which was incumbered by a mortgage, the title of the purchaser could not be divested without a decree of the court for the mortgage debt. The estate of the ancestor was liable for his debts while he lived, but the liability could be ascertained and enforced by the judgment of a court of competent jurisdiction only, and a law authorizing a person who was no agent of his, to sell the estate and pay such claims as the legislative agent might determine to be just debts, would be unconstitutional and void. The administratrix appointed by the authority of Massachusetts was not the personal representative of O. Holman in Alabama, who could report his estate insolvent, divest the heirs of their title, and become a trustee of them, and of such other persons as might be recognized by the orphans' court as creditors of O. Holman. The act of the legislature authorized one who could not become by operation of law, a trustee of real estate in Alabama for creditors and the heirs, to sell the real estate of the heirs upon her opinion that debts were due. In the exercise of the judgment of the legislative agent, the just demands of creditors might be defeated. In a proper proceeding, according to the laws of Alabama, a personal representative, as a trustee of the real estate, could pay no debt out of the proceeds of the sale of it, which had not been decided under the authority of the orphans' court to be due, and would be bound to pay all such debts rateably. Under the act, the agent might pay one and reject another, or pay what was not legally a debt, to the exclusion of just debts. She is not responsible for her acts, under the statute, to the authorities of Alabama. The trust, therefore, for creditors, created by law, and subject to which the real estate descended, was annulled by the act, and the vested rights of the heirs, and the constitutional jurisdiction of the courts of our own State, were conferred by it upon an individual, a re-

sident of another State. A citizen of Massachusetts was vested by the act, with the exclusive authority, so far as the real estate in Alabama could be charged with debts of the ancestor, to determine whether he owed debts, and the amount of them, and if in her private judgment debts were due, she was authorized to sell the estate for the payment of the debts. The courts were deprived in the case, if the act be valid, of the power which belongs to them in every other case, of determining whether debts were due from one person, which bind the estate of another person. If the act authorized any other citizen of Massachusetts, by his agents here to sell the real estate, and required the agents to give bond, with sureties, for the payment of the proceeds to him, would any one attempt to maintain the validity of the act? There is no difference between the actual and the supposed case. The legislature was as destitute of power to confer the authority upon the administratrix appointed by Massachusetts, as upon any other citizen of that State.

The supreme court of the United States, in the case of *Watkins v. Holman*, 16 Peters, 61-2-3, decided that the act of the legislature of Alabama, under which half the real estate in controversy was sold, was valid. The court denied that the estate was so vested in the heirs, by the descent of it upon them, that they could not be divested of it without a judgment, or decree, in some judicial proceeding, in which they could be heard in support of their claim to the estate. This court maintained the doctrine which that court rejected as unsound. [4 Ala. R. 752.] That court held, that the principle upon which the validity of a sale of real estate made by an order of the orphans' court rests, was a sufficient authority for the act. It would seem that the supreme court of the United States did not consider an order of the orphans' court to sell real estate, under the laws of Alabama, as a decree rendered in a proceeding *in rem*, to which the heirs are legally, and may be actually parties. The supreme court of this State holds the proceeding to be one *in rem*. [6 Porter's Rep. 219.] That court said that the legislature has power to authorize an administrator, by a general law, to sell lands where the personal assets are exhausted, without any application to the court. If a descent were cast after the enact-

ment of so extraordinary a law as the one supposed by the supreme court of the United States, the validity of such an act would seem to be very questionable, as it would confer authority upon an individual, without any judicial power in Alabama, to determine that the primary fund for the payment of the debts had been exhausted, that claims set up against the ancestor were just debts, and binding upon the estate of other persons who were his heirs. No reason is perceived why power could thus be constitutionally exercised by a mere individual, to determine the validity and amount of debts claimed to have existed against the ancestor, at the time of his death, which no one would concede to the same person acting under a statute, authorizing him to ascertain the validity and amount of the debts of a living citizen, and without the approval, by the alledged debtor, of the debts recognized by the legislative agent, and against his consent, sell his real estate for the payment of his debts. But no such act existed when the title of the heirs was vested in them by the descent which was cast upon them. If before the death of the ancestor, the statute law of the State had authorized the issuance of an execution after his death, upon a judgment which was rendered against him in his lifetime, and the sale of the inheritance to satisfy the execution, such a sale might be valid. The validity and amount of the debt had been established against the ancestor, by judicial authority, and the heir would take the inheritance incumbered by the legal lien of the judgment. There is no such statute law of this State, and this court has determined that an execution issued after the death of the ancestor, upon a judgment recovered against him while he was alive, is a nullity, and from a sale under it, a purchaser cannot acquire any interest in the land. [4 Ala. R. 752.]

The Supreme Court of the United States said, it was the policy of Alabama to apply the real estate of a deceased person in payment of his debts. It is the policy of the State, in the event only, that his personal property is insufficient for the purpose. It is the settled policy of the State also, to subject, by the exercise of her judicial power, the real estate of living persons to the payment of their debts, but this poli-

cy has never been looked to as a source of legislative power, to appoint an agent to sell the real estate of a living person, and with the proceeds of the sale pay such debts as it may appear to the agent such person owes.

According to the laws of Alabama, the indorser of a note not negotiable, although for the payment of money, is not liable for the debt till after the insolvency of the maker shall have been ascertained by the return of *nulla bona*, to an execution against him, issued upon a judgment obtained in a suit commenced within the time prescribed by the statute law. If the indorser of such a note were to make a mortgage upon real estate to secure the payment of the debt, in the event that the indorsee and mortgagee should take the necessary steps to render the mortgagor liable, the estate mortgaged would not be liable upon the mortgage, in the hands of a subsequent purchaser before the *primary fund* for the payment of the note—the property of the maker, had been exhausted. To foreclose the mortgage, the amount due upon the note, the commencement of the suit against the maker in proper time, and the insolvency of the maker must be proved. Two of these facts could be proved only by records made in the exercise of judicial power. An act of the legislature which should appoint any person an agent to sell the estate and discharge the alledged liability of the mortgagor, for which the act declared that the estate was bound by the mortgage, would deprive the courts of their constitutional power to decide the questions, whether the suit had been brought against the maker within the time prescribed by law, how much was due upon the note, and whether also the primary fund for the payment of it had been ascertained by the return of *nulla bona* to an execution against the maker to be exhausted? Such an act would deprive the purchaser of the estate of his constitutional right to have these questions determined by the judicial tribunals of the State, and refer them all to the private judgment of an individual, who was in possession of no judicial authority derived from the constitution. Such an act would be a striking violation of the constitution of the State, but if it were enacted without the application of the creditor, it would be a wanton violation of that instrument, as well as of the fundamental principles of

justice. According to the law of this State, as settled by the judgments of this court, the title of the estate in controversy was as firmly vested in the heirs of O. Holman, before the passage of the act of the legislature, as the title could be in the purchaser in the case I have put. The personal property of their father was the primary fund for the payment of his debts. That must be insufficient for the purpose, and ascertained to be so, upon the report of the personal representative, that the estate was insolvent, and by the approval of the report by the proper orphans' court before any one could acquire a right to resort to the ultimate fund for the payment of the debts—the real estate which had descended to the heirs. This right could be acquired only by the personal representative. In the exercise of it he could not pay debts, on his own judgment that they were due. The debts to be paid out of the proceeds of the real estate must be determined by the authority of the orphans' court to be due. The orphans' court would allow no debts as a charge upon the estate, which had not either been presented to the personal representative, within the time prescribed by the statute law, or filed within the period directed, in the orphans' court. A judgment for a debt against the personal representative, would be no evidence againstt the heirs that it was a debt. and a charge upon their estate. [3 Porter's R. 10, 31, 38.] When an administrator petitions the county court for leave to sell the lands, on the ground the personal estate is insufficient, the heirs may show the debts are barred by the statute of limitations, and are therefore no charge on the real estate. [Heirs of Bond v. Smith, adm'r, &c., 2 Ala. Rep. 660.]

The failure of the personal representative to prevent the judgment by the plea of the statute of limitations, or of non-claim, would not deprive the heirs of their right to discharge their estate from the demand, by urging the operation of either statute against the claim. [3 Porter's Rep. 39 ; 4 Con. Eng. Ch. Rep. 461.]

The determination of all these judicial questions, was either rendered unnecessary, or referred by the act of the legislature to an individual, without judicial authority, and upon whom the legislature was incompetent to confer such authority, without a change in the constitution, making females eligible

as judges, and electing Mrs. Holman a judge of a court possessing jurisdiction of such questions. The legislative agent, appointed without an application from creditors, was authorized to determine that claims were binding debts against the estate of third persons, which, by law, was a fund only for the payment of debts after the personal property had been exhausted. The agent was authorized to sell the real estate, regardless of the sufficiency of the personal property to pay the debts. Such authority could not be constitutionally conferred upon an administrator appointed by this State, unless he were a judge also of the proper orphans' court. The authority would belong to him then as a judge, and he could not exercise it in a case in which he was an administrator. The constitution of Alabama prohibits the legislative department of the government from exercising judicial power, and the courts from the exercise of legislative power. No power can be both legislative and judicial. If the act be valid, it was passed in the exercise of legislative power, and the acts which confer the jurisdiction which has been mentioned, upon the orphans' courts, are unconstitutional and void. [Aik. Dig. 31, § 1, 2.]

The agreement between Brown and Mrs. Holman, that the passage of the act should be procured, that the conveyance to him should be made under it, without the payment of any purchase money, and in the event specified, one half the estate should be conveyed by him to her, was fraudulent, and a court of equity will enforce no claim set up under the act. [16 Peters, 63, Watkins v. Holman and another.] Nothing appears to show whether Mrs. Holman has been called upon to pay individual debts of O. Holman. The real estate was his individual property, and applicable to the payment of his debts, if he owed such. Yet if Brown has paid any debts in consequence of receiving the conveyance from Mrs. Holman, they were debts of the firm.

As no purchase money was paid upon the sale under this act, there was no authority to make the conveyance to Brown. The sale authorized by the act is not like a proceeding *in rem* in a court. [10 Peters, 175; 6 Peters, 245; 2 Stew. R. 333; Sugden on Powers, 364; Clay's Dig. act of 1806, 225, § 20, 23; 4 Johns. Ch. Rep. 175; 6 Conn. Rep. 387.]

In the case of *Watkins v. Holman and others*, which the supreme court of the United States decided, it was proved that the estate of Holman was insolvent. In this case there is no such evidence.

As the supreme court of the United States, in construing the statute, or local laws of Alabama, is bound to adopt and abide by the construction put upon such laws by the supreme court of this state, that court would, doubtless, in another case, in which the validity of the act was questioned, and the judgments of this court should be produced, hold the act to be unconstitutional, and the sale under it void. [16 Peters, 18.]

As the amount of the mortgage debt had not been ascertained by a judgment, or decree, of some court before the bill was filed for a specific performance, against the heirs of O. Holman, the court had no authority to decree a specific performance. [6 Gill and Johns. 437; *Griffith v. the Frederick C'ty Bank*.]

Sheffield & Barney are jointly interested with the complainant in any decree for the specific performance of O. Holman's covenant, that may be made. They hold under Brown, and by the release of the complainant, as the bill states, and to the part of the estate they hold, they can acquire no legal title without a decree for a specific performance. They are indispensable parties to the bill. [Story's Eq. Pl. § 72, 82, 83, 709.]

The bill does not alledge that the mortgage in favor of the bank, and the alledged covenant from Holman to Brown, were made in Alabama, and as citizens of other States are indispensable defendants, the court has no jurisdiction of the case. The statute law prohibits such proceedings against non-resident defendants unless the cause of action arose within this State. [Aik. Dig. 290, § 27; 5 Ala. Rep. 165; 2 Story's Eq. 48, § 744.]

The answer of a non-resident defendant will not give jurisdiction, as it cannot be conferred by the consent of a party. But the ground of proceeding in this case is joint, upon the alledged covenant from Holman to Brown, against the non-resident defendants, Holman and Agnes Howard. The latter is an infant, and her answer has been made by a guardian

ad litem appointed by the court. His answer does not make her appearance voluntary. [5 Ala. Rep. 167.]

There is therefore no jurisdiction against her, and none against Holman, the other heir, as a separate proceeding against him, upon the covenant, could not be maintained, she is an indispensable party. [1 Story's Eq. § 82, 83.] The question as to the validity of the act of the legislature, is a legal question. [Colburn and others v. Broughton and others, in this court at January term, 1846.]

There are demurrers in some of the answers to the bill. Upon the argument of a demurrer, any cause of demurrer not shown in the demurrer filed, may be alledged *ore tenus* at the bar, and under the general demurrer, the want of proper parties may be alledged *ore tenus* as a cause of demurrer. [1 Story's Eq. Pl. § 464; 6 Johns. Ch. Rep. 143; 1 Hoffman's Ch. Prac. 218; 3 Paige, 321, 452.]

A bill must be dismissed upon the hearing for want of equity, though there be no demurrer, and the answer do not insist upon the want of equity by way of demurrer. [3 Stew. Rep. 9; 1 Johns. Cases, 492, 496; Story's Eq. Pl. § 447; 2 Porter, 177; 2 Dallas, 368; Cox's Dig. 413, § 24.]

The statute of limitations is pleaded, but the bill shows relief is barred by the lapse of time, and the statute of limitations. Upon this ground a demurrer lies to the bill. [Lewin on Trusts, 24 Law Library, 313, top page.]

The bill is multifarious and therefore bad. A majority of the defendants do not claim under Holman. The defendants who claim under Copeland have no interest in the success of the complainant against Holman's heirs, and subjecting for the benefit of the bank another and a better title than Brown's or Copeland's. [Colburn and others v. Broughton, adm'r, and others, in this court, decided at January term, 1846; Gaines and wife v. Chew and Relf, 2 Howard's Rep. 619.]

The bill does not alledge that Brown was ever in the actual possession of the premises. It does not show that Holman's heirs are trespassers, but brings them before the court as the owners of a good legal title, to an undivided moiety of the estate to which the complainant alleges he is equitably entitled. The bill does not alledge that Denton holds under

Copeland. In effect, the bill shows he does not hold under the title of Copeland, as it alledges that other persons named in the bill, of whom Denton is not one, hold all the real estate conveyed by Brown to Copeland, and by him to others, except the lot released by the bank to Sheffield & Barney. As the bill does not alledge that Denton holds under the title of Brown and Copeland, *there could be no relief against him*, if it were proved he held under their title. As the bill alledges Denton is in possession of a part of the premises, and does not state that he holds under Brown or Copeland, and the better and paramount title is shown to be in the heirs of Holman, he may, and the inference is that he does, hold under these heirs, and there can be no decree against him.

CAMPBELL and PHILLIPS, contra.

The circumstances in which it is allowable for one defendant in a court of chancery to examine his co-defendant, are stated in the elementary books. The defendant must have no interest in the result to be accomplished by the use of his testimony. If interested in the event of the cause, or in the costs of the suit, the party is not a competent witness. [Markham v. Smith, 11 Price, 126; Walley v. Brownhill, 13 Ib. 500; Eckford v. Dekey, 6 Paige, 565; Dixon v. Parker, 2 Vesey, sr. 219; Ib. 627; Whipple v. Lansing, 3 J. C. R. 612; 3 Atk. 402.]

The objection to Roper is, that he is directly interested to defeat the mortgage. His estate in the premises is subject to that mortgage, if it is an operative conveyance; and he was interested to show that it had been discharged. He had suffered a decree *pro confesso*, it is true, but the establishment of the conclusion that the mortgage had been paid, would have required a dismissal of the bill against all the defendants, and would have concluded the plaintiff on the subject. [Clason v. Morris, 10 Johns. 547.]

The objection to Morrell is, that he is a defendant to the cause, and interested to the same extent as Roper. He has answered as well as demurred to the bill, and put in issue every allegation. He has, it is true, declared that his interests have been parted with, but the fact has been put in issue, and no proof has been made that such is his relation to

the property. He is liable for the costs of the suit, and charged as a *participes fundis*, with those who introduce him as a witness. [Hutchinson v. Reed, 1 Hoff. Ch. Rep. 315; Williams v. Longfellow, 3 Atk. 582; Deacon v. Deacon, 7 Simon, 378; 4 Eq. Dig. 521, and cases above cited.]

The objection to Mrs. Holman appears from the answer of the defendant, Oliver Holman. He states that the conveyances by Mrs. Holman to Brown were for a temporary purpose, and not designed to impair her interests in the State. That the mortgage to the Bank of Norfolk was a violation of this agreement, and that the rights of the heirs of Holman ought not to be concluded by the act of Brown. Under this state of facts, it will be seen that the relief of the estate from this mortgage, was a matter in which Mrs. Holman is directly interested. [Cases above cited.]

The defendants had no right to employ the papers entitled depositions taken in the case of Davenport v. Bank of Norfolk.

No evidence of any kind was given to identify them. No bill or other record was shown to satisfy the chancellor that a cause was pending in court.

No evidence is produced to show the genuineness of the depositions, or the identity of the witnesses. The mode in which they were produced to the court is fatal to the effort to make them evidence. The counsel for the defendants *offer papers* which they state to be depositions of the same witnesses in another cause. No proof is shown of the cause—of the genuineness of the papers—of the identity of the witnesses. [3 Hill & Cowen's Notes, 1099; Gr. Ev. 110.]

The evidence of Ames, Sheffield, Morrell, and Roper, seeking to charge the Bank of Norfolk, by conversations to which it was not a party, is inadmissible. [Branch Bank at Mobile v. Hunt, 8 Ala. Rep. 876; Bank of U. S. v. Dunn, 51.]

The act of the general assembly of Alabama is constitutional. The whole subject of remedial process, and of remedial laws is entirely within the competency of the legislature. Powers of sale to enforce vested rights are created and modified in every session of the general assembly. When the power does not exist in courts, the legislature creates courts,

and confides its execution to them. It may delegate the execution of the same powers to another authority. The choice of means to enforce existing rights in the absence of an express restriction, belongs to the general assembly. [Watkins v. Holman, 16 Peters, 27 ; Livingston v. Moore, 7 Peters, 469 ; Davison v. Johonnut, 7 Metcalf, 388 ; Rice v. Parkman, 16 Mass. 326 ; 15 Wend. 436 ; 14 Serg. & R. 435 ; 4 Mon. 91 ; 6 Ib. 594 ; 6 Conn. 54 ; Ib. 190.]

The bond of Holman, although it expresses no consideration, is evidence of a consideration. It is evidence by virtue of the statute of this State. [Young v. Foster, 7 Porter, 420 ; Click v. McAfee, Ib. 62 ; Chamberlaine v. Darrington, 4 Ib. 415.]

It is evidence under well known common law principles. [21 Wend. 166 ; 8 Mass. 162 ; 3 Bur. 1639 ; 1 Kean, 551 ; note.]

The court of chancery has jurisdiction to do full and complete justice, and to avoid a multiplicity of suits ; to disincumber property from embarrassment, and in exposing it for sale, to expose it in such a manner as will secure to the parties the best price. The bond of Holman is a burden on the conscience of his heirs, and they are bound to convey the property to the assignees of Brown. They are bound to hold the *legal* title subject to the assignments of Brown of the equitable title. The assertion of title by Holman's heirs is a fraud.

A statement of the case will show the propriety of equitable jurisdiction.

Holman's heirs have suits for a portion of the property—they have possession of a part—the Bank of Norfolk, as mortgagee of Brown, and the purchasers of the title of Copeland, each have suits. A sale of the property under these conflicting titles would be to sacrifice the interests of all parties. The equities of the different parties in regard to the order of sale could not be consulted.

Is there any reason for sending the question of the validity of the act of the legislature to a court of law ? Is there any peculiar necessity for a trial by jury ?

Is there any disputed, or disputable fact, which renders

this so important as to counterbalance the material and equitable circumstances that have been suggested?

The court is compelled to take jurisdiction over the heirs of Holman to the extent of one half the claim. The bond of Holman conveys a mere equity to Brown, and the purchasers from Brown are compelled to come into this court to perfect the title to this extent. Having jurisdiction of the cause to foreclose the mortgage, and to perfect the title as to one half, why should not the whole case be decided? The court will take jurisdiction to avoid circuitry of action.

This view is fortified by the circumstance, that the heirs of Holman have set up their claims *pendente lite*. The claimants under Brown have suffered themselves to be ousted by these parties, after the suit was commenced by the bank.

This court was in possession of the subject matter of the suit. Is it consistent with the dignity of the court to say, that you must go off and settle a dispute which has arisen since your bill was filed, and then you can proceed. Or does not this fall within the principle that a court of chancery having jurisdiction *as to one purpose, will exert it as to all*.

1. The court will then take jurisdiction to avoid a multiplicity of suits. [Baird v. Blond, 3 Mun. 570; 2 Johns. Ch. R. 525.]

2. To avoid circuitry of action. [Hinson v. Myers, 1 Hill's Ch. R. 41.]

3. To enforce the equitable claims of the mortgagee upon the conscience of the heirs of Holman, that they fraudulently deny. * [2 Mun. 196.]

4. To disincumber a title, which the court is required to sell, from entanglement, and to sell it favorably. [Blight's heirs v. Banks, 6 Mon. 194; 6 Leigh, 587.]

5. Having possession of the subject, on the principle of doing complete justice, by deciding all questions that may arise. [5 Peters, 264; 10 Johns. 587.]

6. Having jurisdiction of the cause, the subject matter and parties, and proceeding to determine it, it will decide the whole cause, and bring all the parties before it. [Harris v. Smith, 2 Dana, 11.] It will not permit itself to be ousted. [Wadleigh v. Veazie, 3 Sumner, 164.]

Upon all these questions, we cite, 11 Ohio, 488; Alexan-

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der v. Pendleton, 8 Cranch, 462; 12 Gill & John. 306; 1 Johns. Ch. Rep. 160; 3 Howard's (S. C.) Rep. 441; 5 Leigh, 466.

'The questions of multifariousness is answered by the cases cited in 2 Howard, 619; Kennedy v. Kennedy, 2 Ala. Rep. 571.

The case of the Attorney General v. Cradock, 3 Mylne & Craig, 85, is quite in point on this subject.

ORMOND, J.—Perhaps the best mode of considering this complicated case, is, by first disposing of those questions, which are preliminary to the main question, before proceeding to the discussion of the merits of the case. We will, therefore, first dispose of the questions arising upon the rejection of the testimony of the defendants, and the refusal to reject that of the complainant.

The bill is filed by the Bank of Norfolk, to foreclose a mortgage on certain lands in the city of Mobile, executed by one Charles Brown; the title to one half of which, it is alledged in the bill, was obtained by Brown in the following manner: "That after the death of the said Oliver Holman, his widow took out letters of administration upon his estate, and by authority of an act of the legislature of the State of Alabama, the said administratrix conveyed by deed, to said Charles Brown, all the interest of said Oliver, remaining in the said estate, for and in consideration of the sum of \$——, a copy of which deed is filed, marked exhibit B."

Oliver Holman, by his answer, admits that Brown purchased under color of the act mentioned, but denies knowing whether the bond which the act required to be given, preparatory to a sale, was ever executed by Littlefield & Davenport.

The act of the Legislature referred to, was passed on the 31st December, 1823, and is as follows:

Be it enacted, &c. That the administratrix of the late Oliver Holman, resident in the city of Boston, in the State of Massachusetts, be and she is hereby authorized, to sell by Nathaniel Littlefield, and Gorham Davenport, her attorneys in fact, the real estate of which the said Oliver Holman died seized in the city of Mobile, on such terms, and in such man-

ner, as may be deemed most advantageous to the estate of the said deceased.

2. That the said administratrix be, and she is hereby authorized, by her attorneys aforesaid, on the sale of said estate, to make the purchaser, or purchasers, as the case may be, a legal conveyance of the same, which shall be as binding as if the same had been made by the said Oliver Holman in his lifetime.

3. That Nathaniel Littlefield and Gorham Davenport, before the sale of the estate aforesaid, shall enter into bond, with sufficient security, payable to the judge of the county court of Mobile county, for the true and faithful payment of the money arising from the sale of said estate, into the hands of the administratrix thereof, to be appropriated to the payment of the debts due by the decedent.

At the hearing, the complainants produced a bond, in the penal sum of \$30,000, purporting to be the bond of Littlefield, Davenport, and others, and to have been executed in compliance with the preceding act, previous to the sale of the land of Holman's estate, which the defendant objected to, because there was no allegation in the bill that such a bond was made.

It is certainly a cardinal rule in equity pleading, that the complainant should alledge such facts, as show a title in himself; if he does not, the bill is demurrable. The facts must be so stated, in the language of Judge Story, that the court may infer a title in the party. [Eq. Pl. 556, § 730.] It is not however necessary that any thing more than a *prima facie* title be averred. Thus, it is sufficient to rely on a feoffment, without alledging livery of seizin; or a bargain and sale, without averring an enrolment. [Coop. P. 5; Harrison v. Hogg, 2 Vesey, jr. 327.]

The bill alledges the execution of the mortgage by Brown, who, it is alledged, was seized, or pretended to be seized, in fee, of the mortgaged estate. This was doubtless a sufficient allegation of title in Brown, if the entire purpose of the bill had been to foreclose the mortgage. It had another object. Brown, though in possession of the entire estate, had a legal title to but an undivided moiety, and for the residue, claimed title under a covenant from O. Holman, deceased, to

make title, and for this portion of the land, the bill seeks a specific performance from the heirs of Holman. In relation to the other half, it is alledged, that Brown held the deed of the administratrix, by virtue of a sale made under the authority of an act of the legislature of this State. In our opinion, this allegation was sufficient. We cannot presume that the sale was not made in conformity to the act, but until the regularity of the sale is questioned, will presume that it was conducted in the manner directed by the act. And this being put in issue by the heirs, it was clearly competent for the complainant, to prove the execution of the bond, which the act made a pre-requisite to the sale. The validity of the law, will be hereafter considered.

The propriety of the exclusion of the defendant's testimony, will be next considered.

Most of the testimony thus excluded, was of defendants to the bill, whose testimony was directed, on motion, to be taken by the chancellor. The order to examine a co-defendant, as a witness, does not ascertain his competency to testify, and if, at the hearing, it appears that he has an interest, his testimony will be rejected. [Whipple v. Lansing, 3 Johns. C. 612; Murray v. Shadwell, 2 Ves. & B. 401.]

The deposition of Roper was properly rejected, as he had a direct interest in the event of the suit. He was a purchaser of part of the land from Copeland, under an assurance, as he states, that the mortgage of the bank was satisfied; and as a decree against the bank, either because of the invalidity of the mortgage, or discharge of the mortgage debt, would exonerate his property from this incumbrance, he was clearly an incompetent witness for the defendants.

The deposition of Morrell was also properly rejected. He was also a purchaser from Copeland, with notice of the mortgage, and in his answer denies having any interest in the controversy, because, as he states, he had sold, and conveyed the land as purchased, to several persons whom he names, by quit-claim deeds, copies of which he offers to produce. He further proceeds to answer the entire bill; insists that the mortgage debt was paid; charges the bank with collusion with Copeland; insists on proof of all the allegations of the bill, and demurs to so much of it as seeks a specific perform-

ance. A party improperly made a defendant, and who wishes to be discharged without the payment of cost, must not only disclaim all interest in the controversy, he must also abstain from engaging in the defence of the suit. By so doing, he makes himself a party to it, and although if not interested, he must be dismissed, he will not be entitled to costs. The defence made by this witness, is as active, and energetic, as that of any other defendant to the suit, and he had therefore a direct interest to cast the costs upon the plaintiff, which is such an interest as would disqualify him from testifying for his co-defendants. [Markham v. Smyth, 11 Price, 126; Wooley v. Brownhill, 13 Id. 600.]

Again, he is, as a purchaser from Copeland with notice of the mortgage, directly interested in the event of the suit. From this interest he seeks to absolve himself, by alledging a sale without warranty of title; but being *prima facie* incompetent from this cause, his competency should have been shown at the hearing, by the production of the deeds, or other satisfactory proofs of their contents. It has been already observed, that the competency of a defendant, examined as a witness for his co-defendants, must be shown, if objected to at the hearing. This precise objection was taken, and not removed, he therefore, for this cause, as well as the preceding, appears on the record as an interested witness.

Mrs. Holman, the widow of O. Holman, deceased, was made a defendant, and answered, disclaiming all interest, and praying to be dismissed. Her testimony was also taken by her co-defendants, and in our opinion was, so far as the objection went, correctly rejected by the chancellor.

Her son O. Holman, in his answer, alledges, that the conveyance of the administratrix to Brown, was induced by the persuasions of the latter, to enable him the better, to settle up the affairs of the firm, of which her husband and Brown were the partners. That after the conveyance was thus made, Brown borrowed \$20,000, to enable him to improve the property, and executed his bond with condition, when this sum was discharged by the rent, to reconvey to her and her family. Without now stopping to inquire, what effect a secret trust of this kind, could exert upon the plaintiff, lending its money to one having the legal title, upon the security

of the property, it is perfectly apparent, the administratrix was directly interested to maintain this defence, as its success would reinvest her and her children, with the title she had parted with to Brown, and defeat the mortgage.

Certain portions of the interrogatories, and answers of Barritt Ames, were also objected to, and rejected by the chancellor. The design of the third question, is to prove the hand writing of Brown, to a letter addressed to G. Davenport, in Mobile, in relation to his property in Mobile, and stating, that he had, with the consent of the Bank of Norfolk, appointed Mr. Ames as his agent in Mobile, &c. It is very clear, that no declaration of Brown, can affect the bank; it is as to the bank mere hearsay. The fourth, fifth, and sixth, relate to conversations between Brown and Ames, by which the latter was directed to transmit to Copeland, the rents and proceeds of the estate in Mobile, and informing him, that Copeland was the *agent of the bank*, to which Copeland assented, and that he remitted to Copeland at different times, upwards of \$28,000, as the agent of the Bank of Norfolk. That he considered Copeland as the agent of the bank, and made the remittances to him on the part of Brown, in that character.

The evident design of this testimony, is, to establish the fact that this sum of money was paid to Copeland as the agent of the bank, in extinguishment of the mortgage. But to make Copeland the agent of the bank, its assent was necessary. Neither the declaration of Brown, or the assent of Copeland to receive the money as the agent of the bank, has any tendency to prove, that the bank knew, or assented to the arrangement, between Brown and Copeland. Nor is there any thing in the fact, that Copeland was a director of the bank, from which such assent can be inferred. These answers were therefore properly excluded, as it is not shown that the bank was privy to any of these conversations, or arrangements, or in any manner gave its consent to the appointment of Copeland as its agent.

The agreement entered into by counsel, in another suit, upon the answer of the Bank of Norfolk, to a bill filed by G. Davenport, against Brown and others, appears to us to be wholly irrelevant, and was properly excluded. That portion

of the agreement relied on, reads thus: "And it is agreed between the attorneys to this suit, that no objection shall be made, that Copeland has hitherto been permitted to represent our claim;" which is signed by the counsel for the complainants, and the bank. The purpose of offering this, seems to be, to establish the fact, that Copeland had represented the bank in the management of that suit, from that to infer the fact, of Copeland's agency, or interest in the claim. Assuming the claim spoken of, to be the mortgage now under consideration, and that in the suit, Copeland was permitted to represent the bank, and control the management of the suit, this fact, if important to be proved in this cause, could not be established by the admission of the counsel of the bank, in a previous cause, with which this has no connection. As the representatives of their clients, counsel have doubtless power to admit the existence of the facts; but such admission, as proof of the existence of the fact, is available only in that particular case. It would be a most alarming doctrine, that an admission made by counsel, in the progress of a cause, was proof of the fact so admitted, through all future time. The authority of counsel is confined to the case in which he is employed; he has no power to bind his client, beyond the effect of the admission, in the particular case in which it was made.

The complainant also objected to the reading by the defendant of the depositions, of Simmons, Hickling, and Whiting, taken from the files of another cause, and they were rejected by the court. Depositions taken between the same parties in another suit, where the same point is in issue, may be given in evidence. [Ritchie & Co. v. Lyne, 1 Call, 489; Rowe v. Smith, Id. 487; Arderry v. Commonwealth, 3 J. J. M. 183; Lawrence v. Hunt, 10 Wend. 80; Boardman v. Reed, 6 Peters, 328.] The precise objection was taken to the reading of these depositions, that they were not taken in a case between the same parties, and it does not appear from the record that the difficulty was removed. There is, therefore, nothing shown upon the record making these depositions evidence of the facts there stated; and if offered for that purpose, they were properly rejected. There is one purpose, however, for which they were competent, to impeach the

credibility of these witnesses, by showing, that they deposed differently at another time. And as these witnesses had been examined by the complainant in this cause, and cross examined by the defendants, that was doubtless the purpose for which they were introduced : such also appears to have been the understanding of the complainants, from the exception taken. When the object is not to establish the facts stated by a witness, but to impeach his credit, a deposition made by him, between any parties, is evidence to contradict him, but not to support his testimony. [1 Stark. Ev. 276 ; Holdroyd's case, 2 Russ. & R. C. C. 89.] And in such a case, where part only has been read, the opposite party may read the entire deposition, for the purpose of showing his consistency. [Temperly v. Scott, 3 C. & P. 341.]

It is objected, that the attention of the witnesses should have been called to these statements previously made, that they might have an opportunity to explain them, but we can find no such qualification annexed to the right of introducing a previous deposition, for the purpose of discrediting a witness. The rule here adverted to, is the one settled in the Queen's case, 2 B. & B. 313, and which has been frequently acted on, and affirmed in this court. The rule, by the very terms in which it is proposed, applies to the oral examination of witnesses, proposed to be impeached, by acts done, or declarations made, relating to the cause. It cannot, in the nature of things, apply to such a case as this, because, until the last deposition is taken, it cannot be known that there will be any discrepancy between them. These depositions must, therefore, be looked to, so far as they contradict the statements last made ; and this closes our examination of this part of the case, in which we have endeavored to be brief, even at the expense of perspicuity.

It is further urged, that the bill is multifarious, because it seeks a specific performance against the heirs of Holman for a moiety of the land, and a foreclosure of the mortgage upon the entire tract against all the defendants. This is a common objection, and has been frequently passed on by this court.

It is perfectly obvious that all these defendants have a common interest in the subject in litigation, though they claim

under distinct titles—the purchasers from Brown, and Copeland, and the heirs of Holman, being alike interested in opposing a foreclosure of the mortgage, and this, it is said, is sufficient to justify their being united in the same suit. [Story's Eq. Pl. § 285, and cases cited; see also the At. Gen. v. Craddock, 3 Mylne & Craig, 85; and the Atto. Gen. v. Mayor of Poole, 4 Id. 17, as strongly in point.]

But this case is peculiar, and although it may be brought within the influence of the cases cited, and others determined by this court, to be found on the brief of counsel, yet it appears more distinctly to belong to other acknowledged heads of chancery jurisdiction. If a suit were prosecuted against the heirs of Holman alone, for a specific performance of the covenant of their ancestor, and a decree obtained against them, another suit would still be necessary for the foreclosure of the mortgage. Therefore, to prevent a multiplicity of suits, and the delay and expense consequent thereon, there being no incompatibility in the defence of the defendants, but all having a common interest, in resisting the decree sought to be maintained, they may be united in one suit. If the bill was for a foreclosure of the mortgage merely, omitting the heirs of Holman, and consequently without ascertaining their liability to perform the contract of their ancestor, the complainant might be prejudiced by the sale of the property under such circumstances; but the defendants would certainly be injured by the sale, with such a cloud impending over the title. It is not the habit of courts of equity, to sell a doubtful title, where it has the power to clear it up, and ascertain its true character; and hence the rule, that all parties claiming an interest, and within the jurisdiction of the court, must be made parties, that there may be an end of the litigation. This case falls fully within this principle.

Again, the heirs of Holman assert the invalidity of the act of the legislature, under which Brown the mortgagor, acquired title to one half the property, and have in fact as such heirs, acquired possession of part of the mortgaged estate. They were, therefore, if not necessary, at least proper parties, as they asserted a title hostile to the mortgagee, in common with the other defendants. Upon all these grounds, then,

we are clear in the opinion, that they were properly joined with the other defendants in the bill.

It is also contended, that the covenant entered into by O. Holman, deceased, with Brown, in 1821, for the conveyance of one half the estate, ought not to be enforced against his heirs, because the price to be paid for the land not appearing in the contract, it is void under the statute of frauds; and if this objection is not tenable, then a court of equity will not compel the heirs specially to perform the contract, as it is not shown to be founded upon adequate consideration.

The statute of frauds requires all agreements for the sale of land to be in writing, and signed by the party sought to be charged, and certainly, as contended, the price to be paid, is quite as important as any other term of the contract; and if it is not shown by the contract, it cannot be supplied by parol testimony. But it is a mistake to consider this covenant a contract for the sale of land. It is an unconditional promise to convey the land to Brown, at a time stipulated; and as it does not require any act to be done by Brown, as a condition upon which the conveyance is to be made, it includes, by necessary implication, at least *prima facie*, an admission that the consideration, whatever it was, which was the inducement to the promise, had been paid or performed by Brown. It is an admission that a sale has been made, and not a contract, professing to recite the terms of a sale, and is not therefore within either the letter, or spirit and design of the statute of frauds; the design of which being to prevent parol proof of the sale of land, requires all the constituents of the contract to be in writing, and signed by the party against whom it is attempted to be enforced. But why require the terms of a contract to be stated, which the party admits in writing, under his seal, he is bound to consummate by the execution of a deed? The object of the statute is to prevent fraud and perjury, but here there is no danger of either, as the party to be charged has, by his obligation, defined the precise extent of his liability, and has not made it dependent on any act to be performed by the other party. That this conclusion is correct, will be obvious, if we consider what would have been the effect of this bond, if it had contained a penalty. In that event it is clear, that

the obligee could have maintained an action at law, and have recovered the penalty, upon the refusal of the obligor to convey the land; and that the only breach necessary to be assigned, would be the refusal to convey. The legal effect of the bond is not changed by the omission to insert a penalty; that only affects the damages, and does not touch the construction of the instrument, which must be the same in equity as at law.

This conclusion does not however determine the question, as it still remains to be considered, whether it is such a contract as a court of equity will enforce the performance of. In *Gould v. Womack and wife*, 2 Ala. R. 83, we considered very fully the power of chancery to decree a specific performance, and we there held, that the jurisdiction was not compulsory—that it was an appeal to the extraordinary power of the court, and that it would not compel the performance of a contract, unless just and reasonable in all its parts, and founded on adequate consideration. The record, though exceedingly voluminous, affords no aid in determining the circumstances under which this agreement was made, or what was the consideration, if any, which was the inducement to the promise—whether it was a sum of money agreed to be paid, actually paid, or merely voluntary. All that we know of it is, that the covenant was made by Holman; that Brown went into possession of the property, claiming it as his own, borrowing money upon, and finally selling and transferring it by a deed in fee.

As this court cannot determine this question, without a knowledge of the facts, it becomes necessary to inquire upon whom does the burthen of proof lie to establish them, and what in the present condition of the cause, are the legal inferences from the record.

This is properly a question of pleading, for if it is necessary that the complainant, to entitle himself to a specific performance, should show that the consideration was paid, and that it was such as to call into exercise the extraordinary power of the court, it was certainly necessary that he should have made these allegations in his bill, and such is the argument in this court. Upon the other side, it is contended, that although the bond does not state a consideration, it im-

ports one at common law, and that independent of this, the *onus* of proving a want, or inadequacy of consideration, is cast upon the defendant by the act of 1811. [Clay's Dig. 340, § 152-3.] "Whenever suit shall be commenced in any of the courts, founded on any writing, whether the same be under seal, or not, the court before whom the same is depending, shall receive such writing as evidence of the debt, or duty, for which it was given; and it shall not be lawful for the defendant to deny the execution of such writing, unless it be by plea supported by affidavit. Whensoever any suit is depending in any of the courts, founded on any writing under the seal of the person to be charged, then it shall be lawful for the defendant, by a special plea, to impeach, or go into the consideration of such bond, in the same manner as if it had not been sealed." In the construction of the first branch of this statute, it has been held, that every written promise, whether under seal or not, for the payment of money, or the performance of a duty, is *prima facie* evidence of a consideration, and that it devolved on the defendant to show there was none. [Phillips v. Scoggins, 1 S. & P. 28; Chamberlaine v. Darrington, 4 Porter, 515; Click v. McAfee, 7 Id. 62; Young v. Foster, Id. 420.]

At common law, a writing obligatory, imported in itself, that it was founded upon a consideration; and as any consideration was sufficient to sustain the promise, the common law presumption went no further, than the exigency demanded—that there was a consideration, not that it was full, or adequate. Courts of equity have, however, always exercised the right of inquiring into the consideration of sealed instruments, and it might perhaps be well doubted, whether it would decree a specific performance upon the common law presumption, as the consideration might be grossly inadequate, or in fact be entirely voluntary. But we are relieved from the consideration of this aspect of the case, because, in our judgment, this question is decisively settled by the statute previously cited, and the adjudications upon it. The statute did not merely place bonds and unsealed instruments upon the same footing, in regard to pleading, it also promulgated a rule of evidence, applicable alike to sealed and unsealed instruments, by which the instrument, after its considera-

tion was put in issue by a plea, was made *prima facie* evidence of the "debt, or duty," and the burthen of proving the contrary, cast upon the defendant. In the case last cited, *Young v. Foster, supra*, it is said, the statute "has the effect of making the instrument sued on *prima facie* evidence of the debt, or duty, it imports to be given for—that the consideration of such writing can only be put in issue by a special plea, and that the burthen of proof will then be on the pleader." This is conclusive. The instrument is presumptive evidence that the obligor was bound to make a title to the land, and until this presumption is repelled by proof, effect must be given to it, or the statute becomes a dead letter, as its whole purpose was to change the common law rule, which requires the plaintiff to support his case by proof of a consideration.

The cases we have cited, were it is true suits at law, but the rules of evidence are the same at law and in equity. It would be most unreasonable to suppose, that the statute was not intended to apply to suits in equity, if there was nothing in the statute expressly including such suits. But its language is, that such shall be the effect of written instruments when a suit is depending "in any of the courts," of the State; courts of equity, are therefore within the letter of the statute.

From these considerations, it follows, that until the covenant is impeached by proof, that it was a voluntary act without consideration, or that the consideration was grossly inadequate, or some fact, or circumstance shown, which would prevent this court from interfering between the parties, and leave them to their legal remedy, the complainant has the right to call on the heirs of O. Holman to make the conveyance, which it would be the duty of their ancestor to make, were he now alive. The heirs, as such, are in truth mere volunteers, and invested with no right, which their ancestor did not possess, and can therefore urge no objection which he could not make.

We come now to the consideration of that, which was probably considered the principal question in the cause—the validity of the sale made under the act of the legislature. This act it is strenuously urged, is unconstitutional, because,

as is alledged, it was an unlawful interference with the vested rights of the heirs of O. Holman. The act has been already cited at length. It authorizes the administratrix, resident in Massachusetts, by certain persons, her attorneys in this State, to sell the real estate of her intestate in Mobile, for the purpose of paying the debts of the deceased. This is a question of great delicacy, and magnitude, involving as it does, an inquiry into the legality of an act of a co-ordinate branch of the government—the importance of this particular case, and the number of titles depending upon the legality of similar legislation, demanded, and we have given to it, all the reflection, and examination, the recess of the court has enabled us to bestow upon it.

To a correct understanding of the question, it becomes necessary to define the terms, “vested rights,” and thus to ascertain what *rights* are *vested*, in such a manner that they are placed beyond the pale of legislative control. In the United States, certain political rights are conceded to be retained by the people, and the power to interfere with, or in any manner to impair them, not delegated to any department of the government. Some of the most obvious of these, are enumerated in the bill of rights of this State. These are *vested rights*, the inheritance of every American citizen. We have mentioned this class of rights, to prevent confusion, and to distinguish them from those rights, which belong to all the people of the States, as members of the body politic. These, are not like those just mentioned, inherent in man, as a member of the social compact, but are those rights which are alike secured to all the people, by the existing law of the State; which being derived from the authority of the people, and expressed by the legislative will, may be changed, modified, or altogether abrogated, by the same power which gave them existence. The only limitation upon the exercise of this power by the legislature, over the appropriate subjects, and within the proper sphere of legislation, being, that it shall operate on all—that what is law for one man, shall be the rule of conduct for all.

The right of succession to property, by the heirs at law of a deceased person, or to take by bequest, is not a natural right inherent in man, but is purely a civil right, which is a

vested right, because secured by the law of the State. It was the established law of the State long anterior to the passage of this private act, that all the property, both real and personal of a decedent, should be subject to the payment of his debts, and it follows, that where real property descends to the heir, or devisee, it does not vest in him absolutely, but subject to the payment of the debts of the former proprietor; and for this purpose it may be sold on petition of the administrator, by order of the orphans' court, and the title of the heir, or devisee divested. Such being the law applicable to all persons, the only question is, whether the legislature had power to do by a particular law, applicable to a particular case, that which it had previously provided might be done under the general law, in all similar cases.

There are certainly objections to such partial legislation, but it appears to us impossible to maintain that the legislature cannot accomplish by a particular law, the same object, which might be effected by the general law then in existence, although there is a different mode provided to effect it. It cannot, it is true, pass a particular law, which deprives those on whom it is to operate, of rights which under the same circumstances, are secured to all other citizens; and it is supposed such is the case here, because the heirs were not required to be cited, to contest the fact of the indebtedness of their ancestor, previous to the sale. It was competent for the legislature, to have authorized a sale by the orphans' court, without a citation to the heir in all cases, as is done in many of the States; but as the general law of this State requires a citation to the heir, and conceding this right of the heir to contest the fact of the necessity for a sale, to be a vested civil right, he is not deprived of it in this case. It can make no essential difference, whether the heir is cited before a sale is ordered to be made, or whether the purchaser takes the property subject to the action of the heir, if the ancestor was not indebted so as to make the sale necessary. The essence of the right consists in the ability to institute an inquiry into the propriety of the sale, and whether this right is to be exerted before the sale is made, or is left to the discretion of the heir, at his pleasure to institute it afterwards, relates to the remedy, which the legislature may alter, or change at their pleasure,

so that the right is not impaired. This right is not in terms reserved to the heir by this private act, but it is necessarily implied, and upon the concession upon which this argument is based, could not have been prohibited.

It is a necessary corollary from this argument, that there was no exercise of judicial power in the passage of this act. The law, it is true, is founded upon the assumption, that the estate was indebted, and required the sale of this land, but there was no adjudication of these facts, otherwise the heir would be precluded from an investigation of them. It is assumed that the facts are so, upon the representation of those applying for the law, but as there is no judgment, the legislature being incompetent under our constitution to render one, the truth of the facts so assumed, is open to contestation.

Nor is it any valid objection to the law, that the title had descended to the heir before the passage of the act, as the legislature has the power, if it chooses to exercise it, of passing laws having a retrospective effect, although they operate on vested civil rights; provided they do not impair the obligation of contracts. The prohibition in the constitution of the United States, and of this State, against the passage of *ex post facto* laws, applies only to laws passed for the punishment of crimes, and the infliction of penalties. [Calder v. Bull, 3 Dall. 386; Fletcher v. Peck, 5 Cranch, 138; Satterlee v. Matthewson, 2 Peters, 380; Watson v. Mercer, 8 Id. 110.]

Questions precisely similar to this have arisen elsewhere, and such laws sustained as constitutional, by the most respectable courts of the Union. Leland v. Wilkinson, 2 Peters, 427, is very analogous to this, in all its essential features. There, an executrix residing, and having qualified in New Hampshire, made a private sale of land of her testator, situate in Rhode Island, for the payment of the debts of the deceased, and afterwards procured an act of the legislature of that State confirming the sale. An action being brought by a devisee of the land, against the purchaser, the act of the legislature was held to be valid.

In Rice v. Parkman, 16 Mass. 326, an act of the legislature, authorizing the real estate of a minor to be sold, notwithstanding there was a general law delegating the same

power to the courts, was sustained. And in *Davidson v. Johnson*, 7 Metcalfe, 388, it was held, that the legislature had power to authorize the guardian of a lunatic to sell a part of his ward's estate. So, the supreme court of New York has held, that where the rents and profits of land, were given to a father during his life, with remainder in fee to his children, an act of the legislature authorizing a sale of the property for the maintenance of the father, and for the support and education of the children, was valid and binding on the children. [*Clarke v. Van Surlay*, 15 Wend. 436; see also *Estep v. Hutchinson*, 14 S. & R.; *Livingston v. Moore*, 7 Peters, 540; *Shehan v. Mather*, 6 Monroe, 594; *Mather v. Shehan*, 6 Conn. 54.] To these, other citations might be added, but we content ourselves with referring lastly, to the case of *Watkins v. Holman*, 16 Peters, 25, where the supreme court of the United States held, that this act, we are now considering, was not in contravention of the constitution of this State. There are, it is true, adjudications denying the validity of such legislation as this, but the weight of authority is decisively the other way; and although it is undoubtedly the province of the judiciary to pass upon the constitutionality of all laws, and to declare them invalid if unauthorized by the constitution, to which all the departments of the government must yield obedience, yet it is conceded by all courts, to be a power which should not be exercised in doubtful cases. The inexpediency of such laws as this, from their tendency to promote litigation, and the dissatisfaction which even a change of the mode, or remedy, in a particular case, always produces, is admitted, but that is a question of expediency, which the legislature must determine for itself. The utmost that can be said of the legality of such acts, after the numerous decisions sustaining them, the adjudication of the highest court upon this particular law, and the numerous acts of the legislature of a similar kind, is, that their conformity to the constitution of our free government, is not so certain, and unquestionable, as is desirable in all laws. But certainly such scruples as these, do not justify this court in the exercise of its transcendent power, to declare the act a nullity. To justify us in so doing, the act must be a clear,

and plain violation of the paramount law : such not being the case, we are bound to enforce it.

The objection, founded on the fact, that Mrs. Holman administered on her husband's estate in Massachusetts, and not in this State, has been incidentally considered, and answered. Whether a foreign administrator shall be permitted to sue in our courts, or to sell property, appertains exclusively to the remedy; and as such power could be conferred on all foreign administrators, it may be conferred on a particular one. The case of *Wilkinson v. Leland*, 2 Peters, 627, already cited, is in this respect expressly in point. As to the objection that the money was not paid to the administratrix, it is sufficient to say, that no creditor is here complaining. The only question that the heirs have any interest in litigating, is the power of the legislature to pass the act, and whether in fact a sale was made under, and in conformity to it. Whether the money has ever been paid to the administratrix, or if paid, whether she has devoted it to the payment of the creditors, are questions which do not arise between the parties to this record.

It has been already stated, that the fact whether the sale of this land was necessary for the payment of the debts of the elder Holman, deceased, was open to be contested by the heirs, but no such issue is made by them. On the contrary, the only adult heir who has answered the bill, admits, that the firm of Holman & Brown owed debts to a considerable amount, some of which it is alledged are still unsettled. This is an indirect admission of the insolvency of the estate, as the personal property of the deceased, wherever situate, was liable for his debts, and if after the lapse of more than twenty years, some of his debts are still unpaid, the inference is irresistible, that a sale of the real estate was necessary. In addition, it appears from the proof, that the administratrix declared the estate insolvent, in the probate court in Massachusetts.

The arrangement entered into between Brown, and the administratrix, for a re-conveyance of the land, can have no effect on the bank, as it had no notice of this secret trust.

The defendants also insist, that the mortgage debt has been paid by Brown. The bank admits that a portion of the

debt has been paid, and credited on the notes which are exhibited. Messrs. Hickling and Whiting, cashiers of the bank during these transactions, and Mr. Simmons, the solicitor, and also a director of the bank, have been examined, and they deny any knowledge of any payment beyond the amount credited on the notes, and state that the books of the bank furnish no trace of any other payment; and it is difficult to conceive of a negative better established. The depositions of these gentlemen in a former cause, between other parties, were offered, and were proper testimony for the purpose of discrediting them, but in our opinion, there is no material difference between the two sets of depositions, when they treat of the same facts. If, however, these depositions were stricken out of existence, it would not vary the case, as the notes are *prima facie* evidence of the debt, and it devolves on the other side to prove that they are satisfied.

It is not pretended that there is any positive proof of the payment of the debt, but the whole argument, on this point, turns upon the fact, whether Copeland was the agent of the bank, as well as the agent of Brown. It is proven that Copeland received from the agent of Brown in Mobile, a large sum of money, which he did not pay over to the bank, but which, if he was its agent, was a payment to the bank. Copeland was examined as a witness for the bank, and deposes that Brown empowered him to receive the rents and proceeds of the sales of his land in Mobile, and authorized him to pay it over to the bank, and that he did so pay over, until Brown conveyed the property to him for other purposes, after which he applied the rents and proceeds of sales to those purposes; he further states, that all the money he paid the bank for Brown, he took care to see indorsed on the notes. It is clear there is nothing in this testimony, from which it can be inferred he was the agent of the bank. Why he was not examined in the cross-examination upon this point, by the defendants, can only be explained upon the supposition, that they feared he would deny it.

The agreement between Copeland and the bank, by which the latter agreed to convey to the former, all its interest in the mortgage, is also relied on as conducing to prove his agency. But in our opinion, it does not authorize such a

conclusion. Copeland, to secure a large debt which Brown owed him, had obtained from him a conveyance of the property, but this was subject to the mortgage of the bank, and the undertaking of the bank, to release to him on payment of the mortgage debt, has no connection with a recognition of him as its agent. On the contrary, it would seem, rather that the bank would look to him as the principal, and trouble itself no further with the collection of the debt. The reason assigned by Copeland, for entering into the arrangement with the bank, is, that by getting the title of the bank, he obtained the relinquishment of the dower of the wife of Brown, which he did not have to the conveyance he had from Brown. Be the motive what it might, the agreement between him and the bank had a precise and definite object in view, which if not inconsistent with his being the agent of the bank to collect a debt which he there promised to pay, by no means warrants the inference attempted to be drawn from it.

The same remarks apply to the interference of Copeland in the management of the former suit on the part of the bank, conceding such proof to have been made. Being the owner of the equity of redemption, he was directly interested in defeating the claim set up by Davenport to one half the land, whilst the mortgage of the bank was paramount to both. In attending to the suit, he had a motive personal to himself, and we cannot therefore gratuitously suppose that he was the general agent of the bank.

The transaction with Sheffield & Barney, turns upon the same fact, the agency of Copeland. The facts are, that Brown being desirous to sell a portion of the land covered by the mortgage to S. & B., procured the bank to release to him that portion of the land. The reason assigned for this, in the bill, is, that the bank considered the residue of the property ample for the security of the debt. Brown resided in Boston, and Ames, as his agent, in Mobile, sold the land to S. & B. for \$20,000, and received in payment \$8,000 in money, and two promissory notes for \$6,000 each, payable in one and two years. The cash, and the notes, were transmitted by Ames to Copeland, and subsequently it appears, Brown negotiated these notes with the bank, and received the money thereon, he having indorsed the notes. There is

no testimony that the bank received any consideration for releasing the title to this property, or that it had any motive except the one assigned in the bill, which is neither unnatural or improbable. Ames, states in his deposition, that he considered himself both the agent of Brown, and the Bank, in making the sale, and so stated at the time to B. & S., and that he transmitted the money to Copeland, as agent of the bank, but he admits he had no intercourse with the bank, and derived his impressions entirely from the declarations of Brown, and the supposed assent of Copeland. It is too clear for argument, that the bank cannot be affected by this transaction. The discount of the notes by the bank, is conclusive that they were not paid to it in discharge of the debt, and it has been previously shown, that there is no proof of Copeland's agency, so as to affect the bank with the receipt of the money by him. There was doubtless some arrangement between Brown and Copeland, between whom there were large money transactions, that the latter should pay Brown's debt to the bank; but this, it is certain from his own deposition, and that of the bank officers, he did not do, but in part, and such payments as were made, he caused to be credited on the notes. We may dismiss this part of the cause, by saying, that there is no fact or circumstance, from which we are authorized to infer, that Copeland was the agent of the bank, to receive the money due upon this mortgage.

It is a general rule, that the court will decree a specific performance of a contract for the sale of lands, if it has jurisdiction of the person of the defendant, although the lands may lie in another country, as the primary decree in *personam*, and the inability of the court to enforce its decree *in rem*, will be no obstacle to its taking jurisdiction. [Penn v. Lord Baltimore, 1 Vesey, 444.] But the converse of this proposition, is not true, at all events in this State, as the statute authorizing a decree against non-resident defendants, contains a proviso, that "the act shall not be so construed, as to authorize proceedings against persons residing out of the State, unless the ground, or cause of action, or the transaction on which the bill may be brought, took place within the State." It is not alledged in the bill that such is the fact in this in-

stance, and there is internal evidence that the covenant here sought to be enforced, was made in Massachusetts.

The voluntary appearance of the adult heir, will give the court jurisdiction as to him, but the appearance of the infant, Agnes Howard, by her guardian *ad litem* appointed by the court, cannot be considered as the voluntary appearance of the infant. The design of such appointment is to protect the interests of the infant, and it would be placing infants in a worse condition than adults to give this the effect of a voluntary submission to the jurisdiction of the court. [Erwin v. Ferguson, 5 Ala. 157.]

As the court had not jurisdiction of the non-resident infant defendant, it is now contended, that the interest of both the heirs is joint; that she is therefore an indispensable party; and although the adult heir has voluntarily submitted to the jurisdiction of the court, there can be no decree against him alone.

The general rule certainly is, that all persons materially interested in the matter in controversy, either as plaintiff or defendant, must be parties, so that the rights of all may be bound by the decree, and an end put to litigation. But this is not an unbending rule; it is one adopted for the convenient administration of justice, and may be dispensed with, when extremely difficult, inconvenient, or impossible of attainment. If a decree can be made, which will bind those which are before the court, and will not affect the interest of others, who from their non-residence, or other cause, cannot be made defendants, it will form an exception to the general rule, and the court will take jurisdiction, and determine the cause as to the parties before it. [Elmendorf v. Taylor, 10 Wheat. 167; Mallon v. Hinde, 12 Id. 193; Ward v. Aredondo, 1 Hop. 213.] In the case last cited, Ward, a citizen of New York, made a contract at Havanna, with Aredondo, for the sale of land in Alabama, upon which partial payments were made. Subsequently, A. sent a deed for the land to his agent in New York, to be delivered to W. on the payment of a certain sum, which he claimed to be due on the contract. W. denied that the sum claimed was due, and filed his bill for a settlement of the account, and for an injunction against the removal of the deed. The court sustained the jurisdic-

tion, and held, that whenever the parties, or the subject, or such a portion of the subject are within the jurisdiction, that an effectual decree can be made, and enforced, so as to do justice, the jurisdiction would be upheld. [See also, West v. Randall, 2 Mason, 190.]

The principle of these cases is decisive, in favor of the jurisdiction here. The heirs are tenants in common of this land; their interests therefore are not so blended, that the title of one cannot be determined, without the presence of the other. The interest of each is distinct, and separate, though depending on the same title. Each could sell his interest, without the consent of the other, and upon the death of either, it would descend to his heir at law; it may therefore be subjected to sale, or the interest divested, by the decree of a court of chancery, without in the slightest degree affecting the right of a co-tenant. The infant defendant here, will not be prejudiced by this decree, but may, whenever she thinks proper, litigate her title to these lands. It was then the duty of the court, so far as proper parties had submitted to its jurisdiction to pass upon the title; and as to those not before the court, the sale must be made subject to their interest, or claim of title. [Hallett v. Hallett, 2 Paige, 18.]

It is supposed that the bill does not alledge that Brown was ever in the actual possession of the land. The allegation of the bill is, that he was seized, or pretended to be seized, in fee simple of the premises, when he executed the mortgage. This is the usual and customary allegation, and the answer of the heir, in terms, admits that he was in possession of the land in 1824, some years previous to the mortgage, asserting title under the covenant with O. Holman, the elder, and under the purchase made at the sale of the administratrix.

It is also argued, that no decree can be made against the defendant, Denton, because the bill does not state from whom he derived his title—whether from Brown, Copeland, or the heirs of Holman. The allegation of the bill is, that Denton with others, claims to have some interest in the mortgaged premises, and he with the rest is called on to answer the bill. It was not necessary for the complainant to state the source, or the character of the title alledged to be set up against the

mortgage, for of these facts the complainant cannot be presumed to have any knowledge. It was sufficient to alledge, that a title was asserted hostile to the mortgage, and to give the person asserting it an opportunity to produce and litigate it, and that has been done here.

The objection cannot be made for the first time in this court, that notice was not given of the application to the register, for leave to file a bill of revivor against the heirs of a deceased defendant. If the order was made without the necessary notice, a motion should have been made to the chancellor to vacate it, as contemplated by the statute giving this power to the register. [Clay's Dig. 349, § 17.]

It is objected, that the execution of the covenant, from Holman to Brown, is not sufficiently proved. The only persons interested in this inquiry are the heirs of Holman. The defendants who hold under Brown, have the same interest to sustain it as the bank. The adult heir of Holman, does not deny the execution of the bond, but professes ignorance of the fact, though he admits Brown went into possession under it. It bears date in 1822, and appears to have been attested by John and Abraham Holman. It is proved very satisfactorily, that the signature to the bond, is in the hand-writing of O. Holman, deceased. And it is proved by two old residents of Mobile, both of whom have resided there before and since the date of the bond, that they never knew or heard of such persons as the witnesses, in this State. This was, in our opinion, sufficient *prima facie* at least, to show, that the witnesses were not within the jurisdiction of the court, and to authorize the secondary evidence. Especially in a case, where the execution of the bond was not directly controverted, where there had been a possession of more than twenty years under it, and where the bond was more than twenty-two years old, at the time the testimony was taken. To this may be added, that Brown and Holman both resided in Massachusetts, and the whole case affords strong internal evidence that the bond was executed there.

There is no foundation whatever for the argument, that the bank has slept upon its rights. The original bill was filed in 1834, two years previous to which the litigation

about the property commenced, by a bill filed by Davenport, to which the bank was a party, since which time it appears to have been sedulously endeavoring to enforce this mortgage.

Lastly it is contended by the counsel for Davenport, that as he has a title to one half the property, by purchase from Brown, although his title may be inferior to that of the bank, yet as the bank released to Remsen & Jude, the title to a portion of the property covered by the mortgage, and thereby increased the burthen which must fall on the residue of the mortgaged estate, he is entitled to a *pro rata* reduction.

It appears from the record, that Remsen & Jude, who were purchasers from Copeland, sold to Bartlett & Waring, and that the latter, to quiet their title, purchased from Davenport his interest in the undivided half of the property, secured to him, by the decree made in the bill filed by him, against Brown and others. It would seem therefore, that he, at least, has no interest in this question. But let us for a moment consider the pretension here set up.

The mortgagee having lent his money, and taken a mortgage on land, may if he thinks proper, release the whole, or any portion of it, to the mortgagor, or to a purchaser from him. What right has a purchaser from the mortgagor, of a portion of the land, to interfere in this matter? Between him and the mortgagee there is no privity, either in estate or in law, and as he purchased with knowledge, that all and every part of the estate was liable to the payment of the mortgage debt, he cannot complain when it is enforced. If the mortgagee should collude with an insolvent mortgagor, to make the entire loss fall on a particular purchaser, equity might afford relief on the ground of fraud; but that is neither alledged or proved, and it is impossible, that an equity can grow up in favor of a stranger, from the exercise of an undoubted right.

There is no resemblance between such a case as this, and that of a creditor, who relinquishes a collateral security held by him for the payment of the debt, to the debtor, and then seeks to compel a payment of the debt from a surety. The surety is injured in such a case, because, upon payment of the debt, he has the right to be substituted in the place of

the creditor, and to stand in his place, as to all securities held by him for the payment of the debt. But a purchaser from the mortgagor does not stand in the attitude of a surety for him to the mortgagee, and therefore has not the right of one. The last point decided in the case of the Ohio L. I. & T. Co. v. Ledyard, 8 Ala. 875, embodies a principle analagous to the one now under consideration.

The result of this protracted examination is, that the bill must be dismissed, as it respects the infant, Agnes Howard, in all other matters, the decree of the chancellor must be affirmed.

Judge GOLDTHWAITE, not sitting.

RE-ARGUMENT ordered, on motion of defendants in error.

HOPKINS and SEWALL, for plaintiffs in error—

Upon the construction of the act of 1811, relied upon the decision of this court in Singleton v. Gayle, 8 Porter, 27, which they insisted was in point, and was a matter necessary to be decided, and also relied upon the arguments previously urged by them, and contended, that as a statute existed when the act of 1811 was passed, forbidding a decree to be made, notwithstanding a decree *pro confesso* had been rendered, unless the demand was proved, it was evident the legislature did not intend it should apply to suits in equity, therefore the subsequent repeal of that portion of the statute did not affect the construction of the act of 1811. But the statute in relation to decrees *pro confesso* has only been repealed where there has been a service of process, and is in full force as to absent defendants, upon whom there has been no such service.

CAMPBELL, contra.

The opinion delivered by the court, declares that the act of 1811, in so far as it provides a mode of proof, establishes a rule of evidence. This is certainly true as regards courts of law. Is there any exception in the statute to exclude the rule from courts of equity. The rules of evidence in courts of law and equity are, or should be, the same. They should

be the best in both courts, or those courts cease to be courts of justice. [3 Black. Com. 434, 436 ; 1 Story C. on Eq.]

The court of equity will follow the rules prescribed by statute, which constitute laws of property or evidence, although the statute applies in terms only to courts of law. The statutes of limitations and of frauds, are evidences of this truth. [2 Story's Eq. 57 ; Buford v. Buford, 1 Bibb, 301, 395.]

Courts of equity will give to legal instruments the same effect in equity as at law. [2 Keen. 228 ; 4 Hon. 67.]

The statutes authorize the court to carry into effect contracts for specific performance, and gives plenary powers to the court upon that subject. [Clay's Dig. 350, § 29.]

The court, by virtue of its general jurisdiction, may appoint guardians *ad litem* for absentees, although not falling within the description of the absentees mentioned in the acts. [1 Smith's Ch. Pr. 256 ; 3 Beaven, 10 ; 7 Ib. 66 ; 1 Ala. R. 388.]

The power of the court to make rules for the government of courts of chancery, authorizes the court to make rules of process to affect absent defendants. This has been done in Great Britain, under an analagous case.

ORMOND, J.—This cause has been again argued upon two points. First, upon the proper construction of the act giving courts of chancery jurisdiction of non-resident defendants. Second, whether the act of 1811, making instruments in writing evidence of the debt, or duty, for which they were given, applies as well to suits in equity as at law.

The statute authorizing courts of chancery to take jurisdiction of non-resident defendants, upon the constructive notice afforded by publication, confines it to those cases where the "ground, or cause of action, or the transaction on which the bill may be brought, took place within this State." What is the meaning of these terms? The two first, *ground*, or *cause of action*, were doubtless intended to convey the same idea. They are, if not synonymes, certainly used to denote the foundation of the suit. To these are added the term "transaction," which, if not of precisely equivalent import with the two others, being a word of larger and more

comprehensive meaning, was evidently designed to convey an idea which could be embraced within the same category, as the other two, as all three are controlled by the language which follows, "*took place within this State.*" The ground, or cause of action, then, or the transaction which is the foundation of the suit, must have taken place within this State, to give the court jurisdiction of the non-residents, who do not voluntarily appear. The meaning of this peculiar idiomatic phrase, is, to come to pass, to happen, which can with no propriety be predicated of the subject of a contract. It would be absurd to say, a contract took place within this State, because the subject on which it operated happened to be here.

But as citizens of other countries might be concerned in acts within this State, which would require the interposition of chancery, or might assert rights to property claimed by our own citizens, between whom no contract had ever existed, the legislature appears by the term *transaction*, to have intended to embrace every case in which it would be proper to compel the non-resident to come here and litigate his claims. It never was intended, that our citizens should make contracts, or acquire rights in other countries, and then compel the non-resident to come here and litigate the matter. Still less could it be tolerated, that when two foreigners have entered into a contract, one should compel the other to come to this State, and litigate his title, merely because the subject matter of the contract was here. The case of *Wyatt v. Greer*, 4 S. & P. was a controversy upon a contract made within this State, and we are clear in the opinion, that this compulsory jurisdiction, can only be maintained, where the foundation of the action takes place in this State. If that arises out of a contract, the contract must have been made here. If it does not arise out of a contract between the parties litigant, there must be some act done by the non-resident within this State, justifying the interference of chancery; or he must assert title in virtue of some transaction, which took place within this State.

So far as this bill is founded on the contract of the elder Holman with Brown, the compulsory jurisdiction of the court cannot be maintained against the heirs of Holman, as the covenant was made in Massachusetts. Whether it would

have varied the case, if by the contract of the parties it was to have been performed here, we need not inquire, as it cannot be inferred that the covenantor was to come to this State to execute it.

The bill charges, that the heirs of Holman have entered on portions of the mortgaged premises, and are now in the reception of the rents. Upon the principles here laid down, this is such an interference with the property of the mortgagee, as would justify their being made defendants to a bill to foreclose the mortgage on the same property. Such acts done within the State, are a submission to the jurisdiction of the courts of the State, and preclude the actor from claiming the exemption conferred on non-residents. In such cases, the "transaction" takes place within this State, within the meaning of the statute.

So far therefore, as these non-residents have by suit, or otherwise, asserted title to, or possessed themselves of, portions of the mortgage estate, and assert a title hostile to the mortgagee, they were properly made parties, and to that extent, and no further, may a decree be rendered. The rule, that where a court of chancery takes jurisdiction for one purpose, it will retain for all purposes, does not apply to such cases as this. This is a personal privilege, which the parties have waived *quoad* the particular lots on which they have entered. This waiver cannot be extended by implication, to other separate and distinct lots, with which they have never intermeddled by suit or otherwise.

As to those non-resident defendants, whether infants or adults, who assert an interest in the mortgage estate, by conveyances made in this State, subsequent to the mortgage, they are clearly not within the proviso of the statute, and may be made defendants by publication, in the mode pointed out in the body of the act.

We come now to the consideration of the remaining question—the proper construction of the act of 1811. [Toulmin's Dig. 462, § 3, 4.] The proper construction of this act, so far as it operated on suits at law, has been settled by repeated decisions of this court, as shown in the reasons given for the judgment first pronounced. Must the same construction prevail when the question arises in equity?

The rules of evidence are the same both at law and in equity. These rules are nothing more than means devised for the ascertainment of truth, and when the legislature declared that where a suit was founded on an instrument in writing, it should be recognized as "evidence of the debt or duty for which it was given," it must be held to be a general declaration applicable to all suits, in all courts, if the act itself has not precluded all doubt on the subject, by expressly declaring that it should apply, when a suit was commenced on any writing, "in *any* of the courts of this territory."

The rule here promulgated, it is urged has been deprived of its application to suits in equity, by the subsequent acts of the legislature, for the regulation of chancery practice.

It has already been stated as a principle universally acknowledged, that the rules of evidence are the same in equity as at law, but as the mode of proceeding in these courts is different, so also are the implied admissions, which these courts make upon the default of the defendant. At common law, the plaintiff was required to prove his case, though the defendant failed to appear, and a judgment was rendered against him for such omission ; and for that purpose a writ of inquiry was awarded. Whilst in chancery, the analagous case of a decree *pro confesso*, for failing to answer, was an admission of all the allegations of the bill. This rule of the common law was changed by the act of 1823, (Clay's Dig. 351, § 39,) which required the complainant to prove his case, notwithstanding the defendant failed to appear and answer. It may perhaps be well doubted, whether this last act had any effect upon written evidence, when that was the foundation of the bill, and to which alone the act of 1811 applied. and whether it was designed to have any other effect than to change the mode of proof in suits in chancery, as to those allegations of the bill not sustained by written evidence. Be this however as it may, the subsequent statute of 1841, (Clay's Dig. 354, § 58,) restored the English rule, as to those defendants on whom the bill was served, and none of these statutes ever had any application to non-resident defendants, who by the act of 1805, might be made parties to a bill in chancery. As to them, the English rule, that the default was an admission of the allegations of the bill, has been the

law of this State, at least since the passage of the act of 1805. [Arnold v. Sheppard, 6 Ala. 299.]

In truth, the object of the act of 1811, and that of the various acts regulating chancery proceedings, was entirely different. The former changed the rules of pleading, and shifted the burthen of proof from the plaintiff to the defendant, when the suit was on a written instrument, and by necessary consequence, introduced a new rule of evidence. The latter, (so far as they relate to this inquiry,) were designed to regulate the implied admissions, resulting from the omission of the defendant to answer. The effect ascribed by the act of 1841 to a written instrument, is entirely distinct and separate from this, and if the execution of a written instrument, the foundation of the suit is admitted, or being denied, is proved, the law then makes it evidence of the debt or duty for which it was given, and it devolves on the defendant to repel this legal presumption, by the proof of facts inconsistent with the promise, or rendering it inequitable that the promise should be performed.

We directed a re-argument on this point, not because we felt any doubt of the correctness of the judgment previously pronounced, but because a former determination of this court, brought to our notice by the petition for a re-argument, appeared adverse to the decision as announced. The case referred to, is *Singleton v. Gayle*, 8 Porter, 274, where it is said that the act of 1811 does not apply to suits in chancery. The opinion there announced, was not necessary to the decision of the cause, as the court had previously decided a point, which was decisive of the entire case, and affirmed the decree of the chancellor. The judge delivering the opinion then proceeds to answer an argument of counsel upon another point—the necessity of proving the bond and mortgage. As this was wholly unnecessary, it may account for the very brief manner in which the subject is treated, and perhaps palliate an inaccuracy in the reasoning of the court.

In point of fact, the decision was in accordance with the received opinion, and practice, under the act of 1823, which required the court, before rendering a decree in favor of the

complainant, to be satisfied of the justice of the demand, by sufficient evidence, notwithstanding there was a decree *pro confesso* against the defendant. This act, which was then in force, as has been already remarked, has since been repealed.

The decree of the court of chancery is reversed, as to the infant, Agnes Howard, and the case remanded for further proceedings, both in respect to her and the other non-resident defendants, in conformity with the principles here announced. In all other particulars the decree is affirmed. The costs of Agnes Howard in this court, must be paid by the defendant in error, the remaining costs will be taxed against the plaintiffs in error.

HUDSON v. CRUTCHFIELD, ET AL.

1. H executed two deeds of trust to secure to C the payment of certain debts recited in the deed. A sale was made under the deeds, and C became the purchaser, but the property purchased was left with H. After this, C brought actions of detinue against H, and recovered the property, with damages for its detention. To reverse these judgments, H prosecuted writs of error to the supreme court, where the judgments were affirmed with damages; which judgments have since been satisfied, except as to damages and costs. H, a surety in the bonds for the prosecution of the writs of error, then filed his bill, alledging, that the deeds of trust between H and C were fraudulent, and that he was a creditor of H, upon debts due him before, and since the execution of the deeds of trust, and including a judgment which he had purchased against H, rendered since the execution of the deeds, and prayed, that the damages recovered by C from H, for the detention of the property, be applied to the payment of the judgment, of which he was the proprietor. Held, that there was no equity in the bill, to apply the damages for the detention of the property to the payment of the creditors of H, whatever might be the rule, if C were attempting to enforce a delivery of the property itself.

2. A motion may be made a second time, for the dissolution of an injunction, after a refusal to dissolve, accompanied with a reservation, that the motion might be renewed.

Appeal from the Court of Chancery sitting in Benton county.

THE appellant alleges in his bill, that he is a creditor of Aaron Haynes upon different demands, which may be thus classed: 1. Debts accruing previous to the execution of two deeds, which recited the indebtedness of Haynes to Crutchfield, and conveyed to trustees by the former, certain real and personal estate, upon trust to sell the same, or so much as might be necessary to pay the amount intended to be secured; in the event that the grantor made default in the payment. 2. Debts accruing subsequent to the execution of the deed. 3. A judgment rendered by the circuit court of Benton for \$2422 65, besides costs, in the fall of 1839, against Haynes, in favor of Choice, Harbin & Co., of which the complainant has become the sole proprietor by purchase.

One of these deeds is dated in 1837, and the other in 1839. Sales have been made by the trustee in each, of a part, if not all the property embraced by them, at which Crutchfield was the principal purchaser. It is alleged that the demands of Crutchfield, if not simulated, are stated in the deeds at an amount greatly beyond what was really due him; that the deeds are fraudulent, because they were intended by the *cestui que trust* to secure to himself a larger sum than he was entitled to, or to enable the grantor to delay or hinder other creditors in the collection of their debts: *Further*, that the *cestui que trust*, by fraud induced the trustee to advertise and sell the trust property, and at the trust sale put down competition by representing that he proposed to purchase with the view of assisting Haynes, by allowing him to retain the property, and thus affording him an opportunity to re-purchase by paying what was due to the *cestui que trust*.

More than twelve months after Crutchfield's purchase, he brought an action of detinue for the recovery of the personal

property purchased by him under the first deed ; and also brought an action to recover the possession of the real estate ; in both of which he was successful. In the action of detinue, the verdict and judgment were for \$241 28 damages for the detention, and in the suit for the recovery of the lands, the mesne profits were assessed at \$392 84. To revise these judgments, a writ of error was prosecuted in each case to the supreme court, with the complainant, among other persons, as his surety in each case, in writs of error bonds. Both judgments have been affirmed against Haynes, and rendered against himself and his sureties in these bonds, not only for the amounts of the recoveries in the circuit court, but for the damages and costs awarded by the supreme court—all which Crutchfield is seeking to collect.

It is then alledged that Crutchfield resides out of this State; that Haynes was insolvent when he executed the second deed of trust, and has continued so ever since ; that a *fiery facias* was issued on the judgment in favor of Choice, Harbin & Co., and has been returned by the sheriff of Benton, the county in which Haynes resides, “no property found.” If, therefore, the collection of the damages is allowed to be enforced by executions on the judgment in detinue and ejectment, the complainant will be remediless as against Crutchfield.

Further, that both of these judgments have been satisfied, except as to the damages and costs, and it is insisted that the damages should be appropriated to the satisfaction of the judgment of C., H. & Co., inasmuch as they are the proceeds of the property fraudulently conveyed in the deeds of trust, and fraudulently acquired at sales under these deeds.

The bill prays that the deeds may be declared void as to the complainant ; that the sales made under them may be set aside and held for nothing ; or if they be not annulled *in toto*, that Crutchfield may prove what was due him, that a re-sale be made and the proceeds applied fairly and equitably.

Further, that Crutchfield be enjoined from collecting the damages recovered by his judgments, and that the sureties in the writ of error bonds be enjoined from paying the same ; that these damages be applied to the payment of the judgment in favor of Messrs. Choice, Harbin & Co.

C., H. & Co., and the sureties in the writs of error bonds, with the exception of the complainant, are prayed to be made defendants; that an account between the complainant and Haynes, be taken to ascertain the amount due the former; and if the relief sought is inappropriate, then such other and further relief as may seem meet, is asked. An injunction was granted in conformity to the prayer.

Crutchfield and Haynes severally answered the bill: thereupon, on motion, the injunction was dissolved, and this fact, together with the complainant's bond, ordered to be certified to the court of law, as soon as the defendant, Crutchfield, made the refunding bond required by the state. To revise this interlocutory order, the complainant has appealed to this court.

S. F. RICE, for the plaintiff in error, made the following points: 1. The bill was filed by a judgment creditor, who has pursued his debtor with an execution to "no property found," with a view to set aside a fraudulent conveyance by him of certain real and personal property, and a purchase made at a sale thereunder by the fraudulent grantee; and thus subject the proceeds to the satisfaction of the judgment. Its equity is clearly defensible. [5 Ala. Rep. 324; 7 Ibid. 269, 318, 926; 8 Ibid. 694.]

2. A court of chancery will take from a party the benefit of his own fraud, and give to creditors the proceeds of property fraudulently kept from their grasp. [3 Porter's Rep. 249; 2 Ala. Rep. 571; 4 Johns. Rep. 536.] Even the honest purchaser has, where equity required it, been compelled to account for the proceeds of property. [2 Ala. Rep. 256.]

3. An injunction which has been properly granted, should not be dissolved until all the defendants have answered; where two are charged with fraud, one admits and the other denies it, the injunction should be continued for proof. [7 Ala. Rep. 539; 2 Johns. Ch. Rep. 148.]

4. Where one of the purposes of a mortgagor and mortgagee is to deter the creditors from attaching the mortgaged property, as to those creditors the mortgage is void, although the principal purpose was to secure a *bona fide* debt. [2 Pick. Rep. 129; 7 Metc. Rep. 520.]

5. The possession of the property in question by Haynes for a long time after the sale under the deeds of trust, coupled with the other facts alledged in the bill, and not denied even by Crutchfield, is strong proof that there was a secret trust between them, and that the creditors of Haynes were intentionally delayed and hindered in the collection of their debts. [1 Smith's Lead. Cases, 43 Law Lib. 1.]

6. The answer of Haynes contains a full and fair disclosure, and is entitled to greater weight than his co-defendant's, who is charged with a participation in the fraud, and should therefore have made a full statement of every thing pertinent within his knowledge. [7 Ala. Rep. 269, 926.]

W. P. CHILTON, for the defendant in error, insisted that Crutchfield's answer was a full denial of the equity of the bill, and as to him the injunction was rightly dissolved. *Besides*, it may be added, that the complainant is amply protected by a refunding bond which has been executed, and cannot therefore be injured. The answer of Haynes is no evidence against Crutchfield, and though he may have meditated a fraud in making the trust deeds, (which is by no means certain), Crutchfield, who was a *bona fide* creditor, cannot be affected by his *mala fides*, there being no evidence of his participation in it. Haynes's answer is entitled to the less weight, as he testifies to his own fraud.

It is not necessary that the mortgage should state with precision the amount of the debt intended to be secured; for it will be upheld, though it states the debt at too large a sum, or contemplates an increase, and stand as a security for the sum really due, and further advances; especially, if there is no fraud imputable to the mortgagee. [7 Cranch's Rep. 34; 1 Monr. Rep. 69; 6 Johns. Ch. Rep. 429; 2 Leigh's Rep. 353.]

But the bill has no equity—the complainant is contesting the validity of the deeds at law—has elected to proceed there, and cannot be heard in chancery. The judgment for damages against Haynes is no part of the property of the latter, nor the proceeds of it—there was no lien on it, nor any circumstance authorizing its condemnation, more than any other property of Crutchfield.

The party really interested, and who is presumed to be acquainted with the matters alledged, before an injunction rightly granted, will be dissolved, must answer the bill; and such is the effect of the cases cited from 2 Johns. Rep. 148; 7 Ala. Rep. 539. Here Crutchfield is that party. If Haynes has an interest, it is in establishing the fraud in the deed, and thus relieving the complainant, his surety, from liability.

The record discovers many circumstances tending to show that there is an understanding between complainant and Haynes to defeat Crutchfield—this is indicated by the answer of Haynes, by the complainant becoming a surety for the prosecution of a writ of error, &c.

No inference prejudicial to Crutchfield can be drawn from his retention of the property; for he used every legal means to recover it, as soon as his health permitted, though the complainant aided in protracting litigation, the object of which was to recover the possession, by becoming Haynes's surety for writs of error.

COLLIER, C. J.—It is objected by the plaintiff, that the injunction should not have been dissolved, as a motion for that purpose was previously made and overruled. Without stopping to consider whether this argument, abstractly considered, is well founded, it is enough to remark that the dissolution was denied, with an express reservation that the motion might be renewed; and it was therefore regular to submit it a second time to the court.

The answer of Crutchfield denies all fraud in the making of the deeds of trust, so far as he is concerned; declares that his purchaser at the sales made under their authority was fair and *bona fide*, without any effort on his part to put down competition among bidders; and affirms, that a sum much larger than that at which he bid off the property, was due him from Haynes. This defendant also demurs to the bill, assigning the want of equity and other causes.

Haynes answers, admitting most of the allegations of the bill, yet implicating Crutchfield, only in indirect or general terms, in a purpose to aid him in defrauding his creditors.

As Haynes's answer cannot be evidence against Crutchfield, and it is doubtless his interest to defeat the latter, or

procrastinate the collection of his judgment, we cannot perceive upon what principle the injunction can be continued. Crutchfield is the party whose judgment is suspended, and against whom the injunction prejudicially operates, and we incline to think, that he cannot upon a motion to dissolve, be affected by the answer of Haynes any more than he would, if the latter was the complainant alledging the same facts in a bill.

But waiving this view of the case, and it may be asked on what ground can the equity of the bill, as it respects the injunction, be defended? The damages adjudged to Crutchfield in his suits against Haynes, cannot be avoided by the latter in any *forum*, upon the ground that the deeds of trust are void, because they were intended to defraud his creditors. If the purchases at the trust sales were fraudulent, defence should have been made at law by the defendant there.

The recovery in each of the actions may have resulted from the deeds of trust and sales under them, but it must be borne in mind, that Haynes has no claim upon the damages—he is required to pay them, and we have seen he has no equitable defence, which would enable him to defeat the judgments. If Haynes cannot avoid a collection of the judgments, or submits to their enforcement, what right has a creditor of his to interfere? This is not a controversy between contending creditors for a fund of the debtors, which is insufficient to pay the demands of both, in which chancery is asked to settle the question of preference or priority. But it is insisted, that as the conveyances of the property were fraudulent, and should not be upheld to the prejudice of creditors, therefore the grantee or purchaser who has gained a legal advantage, must yield it up. This argument certainly cannot be supported to the extent to which it is pressed.

Let us forget for a moment, that the complainant was one of the sureties of Haynes, in his bonds for the prosecution of writs of error, and then inquire, whether he could, as his creditor, interfere with the collection of Crutchfield's judgments. Conceding that the conveyances of property which are drawn in question were fraudulent, and could not be supported against creditors, and still there is no ground upon which a judgment for a sum of money recovered by such vendee in

consequence of a detention of the property, could be enjoined by a creditor of the vendor; an execution issued upon such a judgment perhaps might be enjoined in its action against that property. Such however, is not the purpose of the bill; for it is admitted that an enforcement of Crutchfield's recovery is attempted against the sureties of Haynes. If the complainant should make out to the full extent the allegations of his bill, his lien upon the estate in question will not relate back to a period previous to the filing of the bill, so as to entitle him to profits derived from it by another person before that time; unless he alledged and showed that such person was accountable to Haynes for the enjoyment of the property. There is no pretence of any thing of the kind, or any foundation upon which to rest it in the present case; for so far from Crutchfield being liable to Haynes, he has actually recovered damages for the use and enjoyment of the estate by the latter, since the purchase under the deed of trust. Upon no principle of law can the complainant be placed in Crutchfield's shoes, and be allowed to enforce his judgments, so as to obtain satisfaction of his claims against Haynes.

As a creditor of Haynes, the complainant cannot satisfy the judgments enjoined, by setting off against them a corresponding amount of his demands. He could not acquire a lien upon them by the exhibition of his bill, nor can Crutchfield be charged with the payment of his claims.

The complainant cannot be relieved on the ground of his suretyship, or any consideration disclosed in the bill growing out of that relation. He does not pretend that his principal can be relieved; nor does he *as a surety* independently of his principal, set up an equitable defence to his liability. The equity assumed is as a creditor of Haynes, and this we have seen cannot avail to enjoin the collection of Crutchfield's judgment as it respects the damages for the detention of the personal, and occupation of the real property. Consequently, the order dissolving the injunction is affirmed.

PINKARD v. INGERSOLL, ET AL.

1. When lands and slaves mortgaged to several creditors, by agreement between the creditors and the mortgagor, are to be sold, and the proceeds paid in definite sums to each creditor, with preference to each in the order he is named in the agreement, they will not be entitled to interest when the agreement is enforced against them on the cross bill of the debtor, and they stand in the same condition to each other as to default in carrying out the agreement.
2. In such a case, although the proceedings are set on foot by a junior incumbrancer, to injoin a senior incumbrancer from proceeding to sell under his mortgage, the costs of suit are properly payable by the incumbrancer, to be reimbursed out of the fund produced by the sale of the mortgaged property.

Writ of Error to the Court of Chancery for the fourteenth District.

THIS case was here at a former term, when the equities between the parties were settled, and is reported *supra*, under the title of Pinkard v. Ingersoll, (page 9, vol. 11.)

It was then held, that the property in controversy should be sold, and its proceeds distributed between the parties, on the basis of an agreement between them, dated the 17th February, 1842.

This agreement provides, 1. That certain slaves therein named, shall be bid off by the trustees, and conveyed to Ingersoll, without further consideration. 2. That McDougald should be paid in the notes for which the property should be sold, the sum of \$8,773. 3. That Watson should next receive in the same manner \$1,154. 4. Then the sum of \$4,363 to be paid in the same manner, in satisfaction of the claim of A. B. Davis. 5. Pinkard then to be paid \$6,000 in the same manner. 6. The remaining property, or its proceeds, to be returned to Ingersoll.

When the cause returned from this to the court of chancery, the chancellor considered these debts, as ascertained by

the agreement referred, must be held to bear interest from its date, and the interest, as well as the principal, paid to incumbrancers, in the order named, before any thing was paid to the succeeding incumbrancer. He also decreed, the complainant should pay all costs, except those decreed in this court to be paid from the proceeds of the property. This decree is now assigned as error.

DOUGHERTY and HEYDENFELDT, for the plaintiff in error, insisted,

1. That under the circumstances of this cause, interest was not allowable, as by its allowance the whole fund may be absorbed by the first incumbrancer, to the exclusion of all others. [Crawford v. Simonton, 7 Porter, 110.]

2. As to the cost, the decree departs from the rule prescribed by this court; and imposes a penalty on the complainant, which should be borne equally by all the incumbrancers, as they stand in precisely the same position.

McLESTER & CHILTON, for the defendants, contended,

1. That McDougald was entitled to interest, as he has been prevented by the injunction from realising his demand from the property. Besides this, it does not appear there is, or will be a deficiency to pay all the creditors. All are alike entitled to interest. [Kirkman v. Van Lear, 7 Ala. Rep. 218.]

2. As to the costs, these were in the discretion of the chancellor, and his decree, on this ground, ought not to be reversed.

GOLDTHWAITE, J.—1. As to the question of interest, between the several parties entitled to payment out of the fund, to be produced by the sale of the property in this cause, we think cannot arise.

The agreement which forms the basis of the decree, ascertains that each is entitled to a specified sum, and the creditors are marshalled in the order in which the sum allotted to them is to be paid. It is evident if these sums could be increased by any extraneous circumstances, the agreement can not be carried into effect. Now, if as between these parties, one was culpable, and others innocent of any thing tending

to delay distribution, there might be some reason for the infliction of interest. But here every one of the creditors are in the same condition; they all seem to have refused to be governed by the mutual agreement between [themselves and the common debtor, and each has fallen back upon; and asserted his pre-existing rights. It is only upon the exhibition of the cross bill of the debtor that the precise equities of all the parties are ascertained. It is impossible that justice can be done without carrying out that agreement *now*, in the same manner as it should have been carried out when first made. We have no adjudications arising on similar facts, to guide us, but the analogies all tend to show that when a fund is divisible, first to one and then to another, and afterwards to others still behind, that the sums allotted to each cannot be disturbed, without entirely changing the results. The accumulation of interest since 1842, would increase each demand nearly one-half, and if allowed, the obvious consequence is, that all the creditors after the first, may be, and the common debtor must be injured. It is said interest is not payable on the purchase money of land, if the payment or tender is prevented by the act of the vendee. [1 Marsh. 161.] So likewise, if he refuse to accept it when tendered. [January v. Martin, 1 Bibb, 586.] And when a fund insufficient to pay creditors, and unproductive of profits, is to be divided, interest should be allowed on the respective claims, only until the proceeds come into the hands of the commissioners. [Anderson v. Anderson, 1 H. & M. 11; see also 3 Paige 400.]

Applying these principles to the case before us, each one of the creditors, by refusing or neglecting to carry out the agreement of 1842, with the debtor, may be considered as refusing to accept the benefit of the property then appropriated; and that property must now be considered as the fund to which they are entitled.

2. Upon the question of costs, we can perceive no reason why the complainant should be charged with them beyond the other creditors. All stand in the same condition precisely, so far as either is in default. But although thus to be considered with respect to their attempt to evade the agreement between themselves and the common debtor, it cannot be questioned there was a sufficient ground for either to re-

sort to the court for its aid. We think the costs should be paid as directed by the decree formerly pronounced.

For the error of the chancellor in allowing interest on the several claims supposed to have accrued since the agreement of February, 1842, the decree must be reversed and the cause remanded; and the chancellor will then adjudge the costs as indicated in the former decree in this court.

Decree reversed, at the cost of all the defendants in error, except Ingersoll, and the cause remanded.

LORE v. McRAE.

1. A writ issued on the 7th January, 1847, and made returnable to "our next circuit court, to be holden for said county, on the third Monday in *October* next," is returnable to the next term of the court, as ascertained by law, and the insensible mention of the month of October, will be rejected.

Error to the Circuit Court of Barbour.

ON the 7th January, 1847, a writ of *fieri facias* issued from the circuit court of Barbour, against Duncan McRae, and others, on a judgment previously rendered, in favor of the plaintiff in error, which was made returnable to "our next circuit court, to be holden for said county, on the third Monday in October next." The sheriff returned the execution into the clerk's office on the 14th April, 1847, and at the spring term, 1847, the defendant moved to quash the execution, and because it was made returnable to the October term, it was quashed by the court.

This is the matter now assigned as error.

BARRY, for plaintiff in error.

BUFORD, contra, cited Clay's Dig. 199, § 1.

ORMOND, J.—The statute referred to, directs that all process shall issue returnable to the next succeeding court, and the only question in the cause is, whether that is not the legal effect of this writ.

It was issued on the 7th January, 1847, and is made returnable to "our next circuit court, to be holden for said county." This is in precise accordance with the statute, and is not vitiated by the addition that the court thus indicated would be held in October, succeeding the time of issuing the writ. This addition was wholly unnecessary, as the law fixes, and ascertains when the next term of the circuit court will commence, and being insensible, must be rejected as surplussage. It is at most a mere clerical misprision, which is amended by the statute of *jeofails*.

In Findlay v. Ritchie, 8 Porter, 452, it was held, process must be construed in reference to the law providing for its issuance, and return, and a writ issued on the 3d January, 1838, returnable to [the county court of the county, to be held on the fourth Monday in January *next*, was held to be returnable to the fourth Monday next after the date of the writ. It will be observed, that in the case here cited, the writ was not, as in this case, returnable to the *next court to be held for the county*, but to a court which it was stated was to be held in January next, after the date of the writ. Yet this court, construing the writ by the law, directing all process issued five days before the commencement of the term, to be made returnable to the next succeeding term of the court, considered the proper meaning of the term *next*, to be, the next January term of the court, after the date of the writ. No such ambiguity exists in this case. The writ is expressly made returnable to the next circuit court, to be held for the county, and as that is ascertained by law, it will control the action of the officer, notwithstanding the insensible addition, that the next court will be in October, the law having ascertained it will be in April. The sheriff was correct in

executing, and returning the writ to the next term of the court, and the court erred in quashing it for this cause.

Judgment reversed and cause remanded.

BENDER v. REYNOLDS.

1. A deed made previous to marriage, by which the property of the wife, is conveyed to a trustee, in trust, that immediately after the solemnization of the marriage, the right to the slaves conveyed, and their issues, profits and labor, shall be held by the trustee, for the joint use of husband and wife, during their joint lives, and after the death of one of them, to the survivor, without being in any manner, subject to the debts of the husband, does not create a separate estate in the wife, but after reduction into possession by the husband, may be sold under execution against him at law.
2. Whether, if it was shown, that either the statute, or common law of South Carolina, where the deed was made, recognized the settlement, as vesting the wife with an estate, not subject to the husband's debts, it would not be the law of the contract in this State, *quere*.

Writ of Error to the Circuit Court of Lowndes.

A *fieri facias* having issued from the circuit court of Lowndes, against the goods and chattels of Wm. B. Townsend, at the suit of the plaintiff in error, was levied by the sheriff of that county on a male slave named Bill. Thereupon, the defendant in error interposed a claim to the slave pursuant to the statute—an issue was made up to try the right of property and submitted to a jury, who returned a verdict for the claimant, and judgment was rendered accordingly.

On the trial, the plaintiff excepted to the ruling of the court, and from the bill of exceptions, we gather the following facts: The slave was levied on at the plantation of the defendant in execution, and at the time of the levy, and for several years previously, had been in his exclusive possession, and under

his control. This slave, with many others, had been employed by the defendant on the plantation referred to, and the profits derived from such employment were enjoyed by him. There was no evidence that the claimant ever derived any profit from the labor of the slave, or had ever attempted to exercise any control over him or the plantation.

A bill of sale was offered in evidence, executed in South Carolina, on the 5th day of November, 1835, by which the defendant in execution, in consideration of \$1,500 paid him by the claimant, as trustee for the claimant and his wife Martha S., bargained and sold to the claimant as such trustee, the slave in question with two others, to have and to hold the same in trust as aforesaid, according to the purposes of the marriage settlement, &c.

The marriage settlement referred to was executed in South Carolina, on the 26th of March, 1835, by the claimant as a trustee, and the defendant in execution, and Martha S. Jenkins, who afterwards became his wife. These articles recite that a marriage was shortly to be solemnized between the two latter, and that Martha S. was entitled to and possessed in her own right of certain slaves, and bonds and obligations described in an annexed schedule; that it was agreed between them that this property should be granted, bargained, sold, released and conveyed unto the claimant, his executors, administrators and assigns, upon certain uses and trusts, &c. thereafter limited, expressed and declared. The deed then proceeds to make Martha S. grant, bargain, sell, &c. unto the claimant certain slaves, and bonds, all of which are designated and described either in the body thereof, or in a schedule, "in trust to, and for the sole and exclusive use, benefit and behoof of the said Martha S. Jenkins, her executors, administrators and assigns, until the solemnization of the said marriage; and from and immediately after the solemnization thereof, in trust to, and for the joint and equal use, benefit and behoof of the said Martha S. Jenkins and Wm. B. Townsend, for and during the term of their natural lives, without being subject in any manner whatsoever to the debts, contracts or engagements of the said William B. Townsend; and in trust to permit and suffer them, the said Martha S. Jenkins and William B. Townsend, and their assigns during

their joint lives, to receive and take the issues, profits and labor of the said slaves, and the interest of the said bonds or obligations, to, and for their joint and equal use, benefit and behoof: and from and immediately after the death of either of them, the said Martha S. Jenkins and William B. Townsend, in trust to, and for the sale and exclusive use, benefit and behoof of the survivor of them, &c. for and during the term of his or her natural life, without being subject in any manner whatsoever to his or her debts or contracts, and in trust to permit and suffer such survivor, during his or her natural life, to receive and take the rents, issues and labor of said slaves, and the interest of the said bonds or obligations: and from and immediately after the death of the survivor of them, &c., in case there should be issue, children or grandchildren of the said marriage, being at the time of the death of such survivor, then in trust, that the aforesaid negro slaves, with their issue and increase, and the aforesaid bonds or obligations should be equally and absolutely divided between the issue of the said Martha S. Jenkins and William B. Townsend, their executors, administrators or assigns, freed and discharged of and from all further or other uses, trusts and limitations whatsoever. And in case the said Martha S. Jenkins should survive the said William B. Townsend, and there should be no issue of the said marriage living at the time of his death, then in trust that the aforesaid negro slaves, with their increase, and the aforesaid bonds or obligations, should be re-conveyed, released and re-assigned and delivered up to the said Martha S. Jenkins, her executors, administrators or assigns, freed and discharged of and from all further or other uses and trusts, limitations or conditions whatsoever. But in case the said William B. Townsend should survive the said Martha S. Jenkins, and there should be no issue of the said marriage living at the time of her death, then in trust that the aforesaid negro slaves, with their increase, and the aforesaid bonds or obligations, should be re-conveyed, released, re-assigned and delivered up to the said William B. Townsend, his executors, administrators and assigns, freed and discharged of and from all further or other uses, trusts, limitations and conditions whatsoever. And it is further mutually covenanted and agreed upon, by and between the

parties to these presents, that in case the said Martha S. Jenkins and William B. Townsend, or the survivor of them, shall at any time hereafter during the coverture, or during the life-time of the survivor of them, think it beneficial to their interest, or to the interest of the survivor of them, to have the aforesaid negro slaves sold, disposed of, or exchanged for other property, real or personal, or in case the said bonds or obligations are paid, that then the said Benjamin Reynolds, on being hereunto requested in writing by the said Martha S. Jenkins and William B. Townsend jointly, or the survivor of them, shall absolutely sell and dispose of the aforesaid negro slaves, with their increase, and invest the purchase money, and also the principal of the aforesaid bonds or obligations, in case the same be paid, in such other property, real or personal, as they, the said Martha S. Jenkins and William B. Townsend, or the survivor of them may require, and such purchased, substituted or invested property, real or personal, shall be held by the said Benjamin Reynolds, his executors or administrators, subjected to the same uses, trusts, limitations and conditions, as are hereinbefore expressed, limited and declared of and concerning the hereinbefore granted and assigned premises, and to, and for no other use, trust, intent or purpose whatsoever, &c., &c."

Evidence was adduced on the part of the claimant, tending to prove that the slave in question had previous to the execution of the bill of sale, been the property of the defendant in execution, and that he executed the bill of sale in consideration of part of the money and interest, which had been the property of his wife, and which was conveyed by the marriage settlement: that the sale and conveyance of the slave was agreed upon and arranged between the defendant in execution, and the claimant as trustee. The execution of the bill of sale and marriage settlement were duly proved; the latter was recorded in the proper office in South Carolina, and also in this State, and the former in this State, so that no objection was made to the execution or registration of either of them.

It was proved that the marriage between Martha S. Jenkins and the defendant took place, and that they lived to-

gether ever since in the enjoyment of the property settled by the deed—the latter having practised medicine and made money thereby. There was no evidence that the plantation referred to, or the slaves thereon, except the one levied on, constituted any part of the property conveyed by the deeds above recited. The consideration of the bill of sale was shown to be such as is recited therein.

The court charged the jury, that the marriage settlement and bill of sale effectually secured the property and interest in the slave in question to the claimant, as trustee against the claims of the creditors of the defendant in execution. That inasmuch as the marriage settlement embraced the property and interests which belonged to the wife of W. B. Townsend, and the same was executed previous to their marriage; and as the interests conveyed thereby furnished the consideration for the bill of sale, if the jury believed such to have been the fact, the property conveyed by the marriage settlement was not subject to the debts or contracts of the defendant in execution, but was exempt from an execution against his estate. Under the legal construction and effect of the writings referred to, the husband had neither an absolute estate or life interest in the slave in controversy, and the jury could not to any extent find him subject to the execution.

Further, that if under the provisions of the deed of settlement and the bill of sale, the creditors of the husband could subject his interest in the property embraced by them, without destroying or interfering with the wife's interest, then the husband's interest would be subject to the execution; but as that would be impossible at law under the terms of these deeds, the husband's interest could not be subjected to execution during the existence of the coverture.

The plaintiff prayed the court to charge the jury—1. That the deed of settlement and bill of sale did not create a separate estate in the wife in the slave levied on, because they conveyed a joint interest or estate for the use of herself and husband for their joint lives at least. 2. That if they believed the defendant in execution had since, and long previous to the levy, the uninterrupted possession of, and the direction and control of the slaves embraced in the deeds, and had received and enjoyed the profits of their labor without

the interference of the trustee, then his life interest in the property was subject to the plaintiff's execution. 3. That from the evidence adduced, the defendant in execution had an interest in the slaves levied on, which could be sold under the execution. All of which several prayers were denied, and the plaintiff excepted to all the rulings of the court.

E. W. PECK and BOLLING, for plaintiff in error.

1. The object of the deed of the 5th November, 1835, no doubt was, to withdraw the property of Townsend from the reach of his creditors, and yet, at the same time, to secure the possession and use of it to himself. This object cannot be carried into effect without violating the plainest principles of public policy, and the settled rules of law. [Hallet v. Thompson, 5 Paige, 583, 586, 587; Br. Bank at Montgomery v. Wilkins, 7 Ala. R. 589, 593.]

2. One of the incidents of property, especially of personal property, is, that it shall be liable to the debts of the owner. [Brandon v. Robinson, 18 Vesey, 429.]

3. A trust which provides that the interest of the *cestui que trust* shall not be aliened, or be made subject to the claims of creditors is void. [Lewin on Trusts and Trustees, 136; 24 Law. L. 70; Green v. Spicer, 1 R. & M. 395; Snowden v. Dalles, 6 Sim. 524; Graves v. Dolphin, 1 lb. 66.]

4. In such cases personal property can be reached by creditors as well at law as in equity. [Carlton & Co. v. Banks, 7 Ala. R. 32; Br. Bank at Montgomery v. Wilkins, *supra*: O'Neil, Michaux & Thomas v. Teague, 8 Ala. 347, and authorities there cited.]

5. The fact that the alledged consideration received by Townsend, was money realized from the marriage settlement, cannot take the said deed out of the influence of the foregoing principles—1. Because, by the express covenants of the said settlement, the trustee had no authority to invest the money in property, except upon written request of husband and wife. 2. Because, if such request had been made in this instance, the transaction could not be sustained, as against the creditors of the husband, inasmuch as it would be obnoxious to the objection, that it was a mere device to take the

property of the husband out of the reach of his creditors, and yet to secure to him the possession and use of it, which we have seen cannot be done. See the cases cited *supra*.

6. Nor can the first deed protect the property from the creditors of the husband, upon the idea that it creates a separate estate for the wife, because the language employed is not sufficient for that purpose, and besides, it is clear from the deed itself, that such was not the intention of the parties. [Harkins v. Coulter, 2 Porter, 463; O'Neil, Michaux & Thomas v. Teague, 8 Ala. Rep. 345, and authorities there cited.]

7. The principle as applicable to cases like the present, seems to be this, (as gathered from the current of the authorities,) that where the trust property is in the possession of a trustee—or, where the subject of the trust consists of funds, and the *cestui que trust* is, in the one case, entitled to the rents and profits, and in the other, the interest as it accrues, the creditor must go into equity—but where the legal title *merely* is in the trustee, and the possession, with the use, is in fact in the *cestuis que trust*, then the creditor may take the property at law; and in such cases, if there be interests in remainder, the remainder man, and not the creditor, must seek the aid of chancery, if he deems it necessary to secure his interest in remainder, or for the purpose of separating the present from the future interest. See the cases 7 Ala. Rep. 32 and 589, 593, and 8 Ib. 347, *supra*; and Williams & Battle v. Jones guardian, 2 Ib. 319; Hallett v. Thompson, 5 Paige, 586-7; Brandon v. Robinson, 10 Vesey, 429; Jones v. Langhorn, 3 Bibb, 453; Chancellor O'Neill, in the case of Joor, et al. v. Hodges, 1 Spears' Rep. 602, and cases there cited by him; Thomas and Howard, trustees, v. Davis, 6 Ala. Rep. 113; Dunn and wife, et al. v. The Bank of Mobile, 2 Ala. Rep. 152.]

L. E. DAWSON and B. F. PORTER, for defendant in error.

1. The intention of the parties in every marriage settlement will be carried into effect, if consistent with the rules of law. [2 Kent, 165; 1 N. Hamp. Rep. 64; 6 H. & Johns. 464; Green, ex'r, v. Rumph, 2 Hill's Ch. R. 1; 3 Brown's Ch. R. 471, or 571 Perkins' ed.]

2. If there be two objects in a conveyance, one of greater and the other of minor importance, if the two are inconsistent the former shall prevail. [Doe ex dem. Thompson, 5 Cow. 371; Jackson v. Moore, 6 Cow. 706; Fonbl. Book 1, § 18, p. 313, or (445); 2 Ala. 156.]

3. The object of this deed of marriage settlement is to protect the interests of the wife, and not the husband. [Rice v. Barnet, 1 Spears' C. R. 581, 583-4-5, &c.; Joor v. Hodges, Id. 593.]

4. Whenever, at common law, a conveyance is made of real estate to the use of husband and wife; it creates an entire interest in the wife not subject to the debts or the control of the husband. [19 Wend. 175; 1 Thos. Coke, 741, note; 2 Kent, 132; 8 Ves. 199.]

6. In analogy to this, it is held, that a purchase of stock, or a gift by the husband, for the joint use of the husband and wife, is a gift to the wife. [1 Roper's H. and W. 41, or 55 Jacobs' ed. 1841.]

7. The words of this settlement, declaring the uses if the *cestui que trust* were not husband and wife, would be a joint tenancy. [Fearne, 268; 4 Kent, 357-8.]

8. Though a man and woman be grantees of land, and afterwards marry, they are joint tenants. Yet if the title be made before marriage, and the possession under it does not arise until the marriage is had, they take by entireties. [Coke on Lit. 187.]

9. Where the husband and wife are the grantees of personal estate, (as in the case 1 Roper. H. & W. 41, or 55, *supra*,) the gift is accompanied with words of exclusion as to the husband is virtually a separate estate. [3 Brown's Ch. R. 318, note to Lee v. Pruett, Perkins' ed.]

10. A separate estate, is simply an estate vested in a woman, which chancery will protect against the power of her husband. [17 Eng. C. R. 1.]

11. No particular assets are requisite to create a separate estate. [3 Brown's Ch. Rep. 320, note; 2 Clancy, 262; 3 Atk. 308.]

12. Whatever interest a wife takes under an antenuptial settlement, excludes the marital rights of the husband. [Lucas v. Lucas, 1 Atk. 270; Clancey, 252, 258; Lamb v.

Wragg, 8 Porter; 2 Kent, 134; 1 N. Hamp. R. 64.] Where the husband takes as trustee, his marital rights do not attach.

13. Where the enjoyment of the estate is put beyond the control of the husband, it is a separate estate. [8 Ala. R. 35; 7 Ala. 592.]

14. The interests of the wife in this deed are not liable by the laws of South Carolina, where it was made. [1 Dessau. 179; 2 Id. 269; 3 Id. 418; Speers' R. 581.]

15. If the court is satisfied that the law there secures the interest under this deed to the wife, it will give it the same construction. [Story's Confl. L. 230-31; 3 Johns. Ch. R. 210; 5 S. & P. 325; 9 Porter, 39; 1 Rich. Eq. R. 187.]

16. If the husband has an interest, it cannot *suffocate* the wife's interest—it is a mere equity, and so complicate that it cannot be reached at law. [1 Spear, *ut supra*; 6 E. C. L. Rep. 564.] Besides it is a joint interest with the wife, and if it were sold, would defeat the wife's estate, or rather the enjoyment of it.

17. That the bill of sale from W. B. Townsend to the defendant in error, is protected by the settlement, see *McMekin v. Edwards, et al.* 1 Hill's Ch. R. 296.]

18. That the restrictions in the deed against the alienation by the husband and wife, or by the husband, is valid, during coverture. [Tuttle v. Armstrong, 17 E. Ch. R. 1; 2 Story's Eq. c. 37, § 1382, 1385.]

19. That the husband may have an interest, and if subordinate to his wife, that it cannot be reached during coverture, see 19 Wend. 175; 8 Ves. 190; 2 Brown's Ch. Rep. 203.

20. That the trust for the wife cannot be destroyed, is the paramount object of the deed. [1 Freeman's Ch. Rep. 77; Fearne, 408.]

21. *Harkins v. Coalter* not an antenuptial settlement. *Wilkins v. Bank*, interest in the husband was exclusive of the wife.

22. That a sale of the husband's interest would be a destruction of the trust. [Carlton v. Banks, *supra*, 5 Ala. Rep. 582, Goldthwaite, J's opinion; Fearn, 320, Smith's edition, note.]

23. The purchase of the husband, under the provisions of the marriage settlement, vested the legal estate in the trustee, and the beneficial interest in the *cestui's que trust*, under the terms of the settlement. [McMeekin v. Edwards, 1 Hill's Ch. R. 296; Bank v. Brown, 2 Id. 558; Bailey's Eq. Rep. 249, note.] The defendant in execution has no legal estate in the property in question, which is indispensable to authorize the levy. [Doe ex dem. Hall v. Greenhill, 4 Barnw. & A. Rep. 689; Carlton v. Banks, 7 Ala. R. 32; The Bank v. Wilkins, Id. 592.]

24. The possession of the husband is altogether compatible with the wife's, either joint or exclusive right, and it does not warrant an inference prejudicial to her. [Atherly on Mar. Set. 281; Doe ex dem. Greenhill, *supra*; Cadogan v. Kennett, 2 Cowp. Rep. 432; Hamilton v. Gill, 3 T. Rep. 620; Jarmin v. Woolaston, 3 Id. 681; Carlton v. Bank, *supra*.]

25. The bill of sale is good; it was but a consequence of the *antenuptial settlement*—is sustained by a valuable consideration, and not in any manner affected by the husband's continued possession. [Atherly on Mar. Set. 161, 162, 165, 173.]

COLLIER, C. J.—In Cook v. Kennerly & Smith, at this term, an agreement was entered into by Kennerly and wife in anticipation of their marriage, by which the personal estate of the latter was conveyed to a trustee for the use of herself and intended husband during their lives; at the death of either of them to the use of the survivor during his or her life; at the death of such survivor, then to such child or children of the intended wife, and the lineal descendants of such child or children, as may be then living, to them and their heirs forever. This deed of settlement also gave to the wife the power of disposing of the property embraced by the same, by writing under seal, &c., to take effect after her death. *It was held*, that the deed, so far from divesting the dominion of the husband over the estate of the wife, actually guarantied to him a right to it during his life; that this is clearly indicated by the terms of the deed, and it cannot be said that the husband had no interest in the property, or that

he ever would have assented to the creation of an inalienable separate estate in the wife. *Further*, that the husband, in virtue of his marital rights, became the owner of all the interest which the deed had conferred upon his wife, during their joint lives, and though a trustee was interposed, yet upon the property coming into the possession of the husband, it was liable to a levy and sale under execution, to pay his debts. This latter conclusion it was supposed was a clear result of the principle which maintains, that the chattel interests of the wife when reduced to the possession of the husband, are his property, and she cannot hold with him, either as a joint tenant, or as a tenant in common.

It was admitted that where an interest is given to a *woman and her children for their support and maintenance, &c.*, that the husband of the woman, in virtue of her marriage will have no right which can be sold under execution at law; but the creditor's remedy, if any, is in equity, where the interests of the wife and children can be separated. The conclusion was, that the life estate of the husband and wife, during the lifetime of the former, in the slaves in question, were liable at law for the debts of the husband.

The deed in the case at bar, expressly declares, that immediately after the solemnization of the marriage of the husband and wife, that the right to the slaves, and the issues, profits and labor of the same, as well as the interest of the bonds embraced by the settlement, shall be held by the trustee for their joint and equal use and benefit during their joint lives, and after the death of one of them, then to the survivor, &c., without being in any manner subject to the debts of the husband, &c. This deed, like that in the case cited, excludes the idea of a separate estate in the wife, by giving her such an interest until the marriage is consummated, and declaring that she shall afterwards hold jointly with the husband. The possession of the husband then, invests him with a title to the property settled, in virtue of his marital rights, during the life of himself and wife, and makes it subject to seizure by execution, unless the declaration that it shall not be subject to his debts shall prevent it from having such an effect.

In *Rugely & Harrison v. Robinson, et al.* 10 Ala. R. 702,

the testator gave to his son and family real and personal estate, which he declared should not be subject to his son's debts. My brethren were of opinion that "whatever a debtor can himself claim to enjoy, as a general use, benefit or interest in property, capable of separation and division, may be reached by his creditors"—"that no one can have a legal or equitable right to property, which is not subject to the payment of his debts, either at law, or by a proceeding in equity, according to the nature of the case." Consequently it was held, that the exemption which the will attempted to give to the property bequeathed, from the son's debts, was opposed to the law, and therefore inoperative. I dissented from the opinion of my brethren in the case referred to—their judgment however, settles the law of this court, and as it is my duty, I of course acquiesce in it. Here then is an authority which determines that the declaration in the deed of settlement, exempting the estate from the husband's debt cannot be supported. The case first cited, maintained, that the marital rights of the husband invest him with an estate, notwithstanding the settlement, exclusive of his wife during his life; and this estate, when coupled with the possession, may be sold under execution at law, although a trustee was interposed as the legal depository of the title.

If the deed of settlement is invalid against the creditors of the husband while he lives, the bill of sale must be alike inoperative; for the latter rests upon, and is dependent on the former. It declares that the trustee shall hold the slaves which it embraces, to the uses and trusts of the settlement. The money which the trustee paid over to the husband, vested in him at least for his life, and the slaves which he substituted for the money, stand in the same situation as it respects the husband's rights. This is a legal truism which is best illustrated by its statement.

Whether, if it was shown, that the laws of South Carolina, either statute or common, recognized the settlement in question as vesting the wife with an estate which prevented the property from being subject to the husband's debts, the courts of this State would not sustain it, is a question not presented in the record. Where the statutes, or the judicial decisions

of a sister State are relied on, they should be proved as facts in the primary court, and if not thus brought forward and referred to in the record, they will not be noticed on error. [Inge v. Murphy, 10 Ala. R. 885.] If however, the decisions of South Carolina go no further than to determine, that to subject the husband's life estate it is necessary to resort to equity—maintaining that he has an interest which is severable from his wife's, we should hold that such decisions would not be authoritative here; as they would not be decisive of any question of right, but have respect merely to the tribunal in which a remedy should be sought. [Cook v. Kennerly & Smith, *ut supra*.

The view we have taken of this case is adverse to the rulings of the circuit court. What we have said will furnish a guide to ulterior proceedings; we need therefore but add that the judgment is reversed and the cause remanded.

HUGHES v. THE STATE.

1. One indicted as principal, cannot be convicted on proof showing him to be only an accessory before the fact.
2. As an assault, with intent to commit murder, is made a felony by the penal code, it is an offence to which there may be accessories.
3. Where the jury, upon an indictment for assault and battery with intent to commit murder, and for an ordinary assault, return a general verdict of guilty, or a verdict finding one defendant guilty of an assault with *intent to kill*, and the other, guilty of an assault and battery, without assessing a fine, it is no error for the court to send the jury out with instructions to return a final verdict.

Writ of Error allowed by this Court to the Circuit Court of Butler.

INDICTMENT against Benjamin Hughes and John S. Hughes.

The first count is for an assault with intent to commit murder, on one Adams. The second count is for an ordinary assault and battery.

At the trial, there was no positive evidence that either of the defendants had committed the assault for which they were indicted. It was shown the assault was committed in the night-time, and secretly, by some person or persons unknown to the individual assaulted, by means of fire arms, loaded with powder and shot. The principal evidence against the defendants consisted in previous threats to take the life of the prosecutor, and there was some evidence tending to show the defendant had ordered and advised one Goffe to commit the offence—neither of the defendants being present, aiding and abetting in its commission.

The court charged the jury, that if neither of the defendants were present, aiding and abetting in the commission of the offence, but they had ordered and advised it to be done by some other person, and were [thus] accessories before the fact, then the defendants, or either of them, might be found guilty, under the first count of the indictment.

The jury, after an absence of some time, returned into court their verdict, in these words, "We, the jury, find the defendants guilty." Their counsel then asked that the jury should be polled, which was done, and each juror assented to the verdict. The solicitor then suggested to the court, that the verdict did not specify on which count the defendants were guilty. Thereupon the court, without any request from the jury, instructed them as to the form of verdicts, in case they found this way or that, and directed them again to retire, and say in their verdict under which count of the indictment they found the defendants guilty. The defendants objected to this, but their objection was overruled, and the jury retired. After some time for deliberation, they returned a verdict in these terms, "We, the jury, find W. S. Hughes guilty of an assault with intent to kill, and Benj. Hughes guilty of an assault and battery."

Thereupon the solicitor again suggested, that an assault with intent to kill, was different from an assault with intent to commit murder, and if the jury intended to find W. S. Hughes guilty of the latter offence, the verdict was insuf-

ficient. He also suggested, that some fine should be assessed against Benjamin Hughes, as he was found guilty of an assault and battery. The court then again proceeding as before, directed the jury to return and consider of their verdict. This was objected to by the defendants.

After a short time, the jury returned the verdict, finding William S. Hughes guilty as charged in the first count of the indictment, and Benjamin Hughes guilty as charged in the second count, and assessed against him a fine of fifty dollars.

The court sentenced Benjamin Hughes to six months imprisonment in the common jail, and W. S. Hughes to ten years confinement in the penitentiary.

The defendants excepted to the several rulings of the court at the trial, and in relation to the several verdicts, and Wm. S. Hughes having been allowed a writ of error, now assigns the same as reasons for reversing the judgment.

WATTS and N. COOK, for the prisoner, insisted—

1. At the common law, an accessory could not be convicted until the trial and conviction of the principal. [1 Chity's C. L. 266; 1 Rus. on C.; 16 Mass. R, 423.] And there must have been an allegation of these facts in the indictment. [Rus. 41.]

2. The statute of frauds (Clay's Dig. 440, § 16,) does not alter the common law, except so far as to authorize the trial and conviction of the accessory, provided the principal has fled from justice, or be dead. And one of these facts must be alleged in the indictment.

3. The first verdict rendered by the jury, in law, amounted to no more than an assault, or an assault and battery. The general finding will be, in favor of life or liberty, referred to the minor charge.

4. The second verdict amounted to nothing more than an assault and battery. [State v. Nancy, 6 Ala. R. 483; State v. Burns, 8 Ala. 313.]

5. The judge had no authority to alter the verdict, or order it to be altered in any *material* thing, nor to order the jury to retire and again consider of their verdict, after they had rendered it. [Chit. 648.]

6. The defendants could not be convicted as principals in the second degree, because not present, or aiding in the act. [1 Russ. 26.]

7. An indictment against an accessory must alledge that the principal committed the offence. [1 Russ. 41-2.]

8. The accessory may controvert the guilt of the principal. [Ib. 42, (margin) 39.]

9. In felonies created by statute, the doctrine of accessories applies, although not stated in the act. [1 Russ. 35, (margin,) 32.]

ATTORNEY GENERAL, *contra*, contended—

1. That there was **no** error in sending back the jury. That a jury may properly be sent back fifty times by the court in order to get a *certain* verdict—the court taking care (as was done in this case) to exercise no influence as to whether their verdict shall be one way or the other. [See *State v. Givens*, 5 A. R. 747; *State v. Blackwell*, 9 Ib. 79.]

2. Without asserting that the charge is correct, what is the punishment of an accessory before the fact, in a case like the present? The code (Dig. 440, § 13) provides that an accessory to murder shall be punished as the principal offender; and no mention is made in the code of the punishment of accessories in other offences. Was it the intention of the code that a different rule should apply to accessories in murder, from that which applies to accessories in other felonies, as respects the punishment?

GOLDTHWAITE, J.—1. We think the Attorney General is right in conceding the charge of the circuit court cannot be sustained. It was probably induced by the impression, either that the prisoners, if acquitted as principals, could not afterwards be indicted as accessories before the fact, or that the offence of assaulting with intent to commit murder, being only a misdemeanor at common law, could have no accessories, but that all concerned were punishable as principals. We shall briefly state our opinion of the law in each of these connections.

It is said by Lord Hale, that if one is indicted as principal, and acquitted, he cannot afterwards be indicted as an acces-

sory before the fact, though he admits the law was anciently otherwise. [1 Hale's P. C. 626.] Mr. Justice Foster, though he states the same doctrine as agreed by the commentators, says he is ignorant of the ground on which it rests. [Foster's C. L. 361, *et seq.*] It seems to us that this doctrine necessarily involves the idea that one may be convicted as an accessory on an indictment charging him as principal, for otherwise, the party thus indicted would inevitably escape. In this view, it is unnecessary to pronounce a determinate opinion, until the precise case arises, but it seems to be put at rest by what is conceded in Gordon's case, 1 Leach, 515, S. C., cited 1 East C. L. 352. There, the indictment amounted to nothing more than charging the prisoners as accessories before the fact, but the proof showed them to be principals in the second degree. It was held they were improperly convicted, but the judges considered an acquittal on this charge, would be no bar to a subsequent indictment, charging them as accessories. In Sowre's case, 1 Russell & R. 25, the prisoners were indicted as principals, but the evidence proved them accessories only, and they were recommended for pardon on the ground the conviction was wrong. The case before us is precisely the same in every respect, and that decision is conclusive, as we entirely concur in its reasonableness. If the conviction could be allowed under the circumstances in proof, the rule that the principal must be convicted or outlawed before the accessory is tried, would in effect be abrogated.

2. The general doctrine is, that there can be no accessories to crimes which are not felonious, but our penal code defines a felony to be any crime which is punishable capitally or by confinement in the penitentiary, (Digest, 439, § 8,) and Sowre's case, just referred to, shows that a statute felony, even when the offence originally at common law was a misdemeanor only, may have accessories before the fact. Indeed, it is said that when a statute makes an offence a felony, though it mention nothing of accessories, yet it virtually and consequentially extends to those who are accessories, whether before or after the fact. [1 Hale, 613; 1 Russell on Crimes, 32.] We refer to this general doctrine, that it may be seen the omission to prescribe the precise mode and

extent of punishment to be inflicted on accessories before the fact, in the penal code, except in cases of murder, is no ground to infer they cannot be punished at all.

3. Upon the other exceptions, relating to the sending out the jury to correct their informal verdicts, we think there is no error of which the prisoners can complain. It is possible the first verdict would be considered as a general finding of guilty on both counts, and therefore, if there was any error, the prisoner has had already the benefit of it. The others were simply informal verdicts, and we entertain no doubt the circuit court might properly direct the jury to retire, and return with one in due form.

For the error in the charge, the judgment, as to the prisoner suing out the writ of error, must be reversed, and the cause remanded for such proceedings as may legally be had. The prisoner, in the meantime, to remain in custody, unless discharged by due course of law.

DAVIS, ET AL. V. BRANCH BANK OF MOBILE.

1. The act of 1841, declaring, that a note payable to the cashier, may be sued on and collected as a note payable to the bank, applies equally to notes which were executed at the time of its passage, and to those which have been since made.

Error to the Circuit Court of Mobile.

JUDGMENT by motion of the defendant in error, against the plaintiffs in error. The parties appeared, and a judgment was rendered on the verdict of a jury, after which the judgment entry recites, "it is further ordered by the court, that the notice, together with the certificate of the commissioners

of the said branch bank, be filed as part of the record in this case."

A bill of exceptions taken by the defendants, recites, that the plaintiff produced a certificate, executed by Henry B. Holcombe, as attorney of the bank commissioners, together with the power of attorney from the bank commissioners, authorizing him to act, and proved the signatures thereto; these were objected to as insufficient, but the objections were overruled by the court. The defendants then moved the court to charge the jury, that in order to enable the plaintiff to recover, it was necessary to show that H. B. Holcombe was cashier of said bank, when the note was taken, or held by the bank, or that he has endorsed the same to the bank. The court refused to give this charge, and instructed the jury, that the allegations in the notice, were sufficient, and that it was not necessary to show that Holcombe was cashier, or that the note was indorsed by him. To which the plaintiffs excepted, and which they now assign as error.

DARGAN, for the plaintiff in error.

1. It does not appear that the court had jurisdiction, and this is necessary, although there was a trial by jury under the general issue. [Smith v. B. B. at Mobile, 5 Ala. R. 26.]

2. The note was executed after the passage of the act of 1841, (Clay's Dig. 112,) consequently, the act does not authorize suit without proof that the note belonged to the bank.

3. The charge, that the allegation in the notice is sufficient to show the bank could maintain the action, is erroneous.

LESESNE, contra.

1. The judgment is on a verdict, and it sufficiently appears that the court had jurisdiction.

2. There is no necessity that the motion for judgment should be made on any particular day of the term, unless the notice particularly specify a particular day. [Ticknor v. Br. B. at Montgomery, 3 Ala. R. 135.]

3. The third assignment of error is sufficiently answered by reference to the statute of Dec. 4, 1841, and the case of Crawford, et al. v. Br. B. at Mobile, 7 Ala. R. 383.]

4. The fourth assignment of error is founded on the supposed insufficiency of the certificate. The certificate was decided to be sufficient at the last term of this court in *Colgin v. State Bank*.

5 and 6. The fifth assignment is answered above ; and the sixth by reference No. 3.

7. There was no further necessity of proof of title in the bank other than was furnished by the production of the note, which under the statute of December 4th, 1841, supplied all the necessary evidence of title.

ORMOND, J.—The case of *The State Bank v. Colgin*, at the last term, is decisive as to the sufficiency of the certificate of the bank commissioners, and of the power of attorney from them to him, to act.

It does appear from the record, that the certificate of Mr. Holcombe, as the agent of the commissioners, that the note was the property of the bank, was produced to the court, which is sufficient to give the court jurisdiction, within the authority of *Smith v. The Branch Bank at Mobile*, 5 Ala. 26.

The act of 1841 (Clay's Dig. 112, § 47) provides, that "all the notes, bills, bonds, or other evidences of debt, held by the State bank or branch banks, payable to the cashier, or the person who has filled the office of cashier, of said bank, or branch banks, may be sued, and collected in the name of the several banks, in the same manner as if they had been made payable directly to the said bank, or branch banks, by which the paper has been taken or discounted." The construction now for the first time attempted to be put upon this act, that it applies only to such notes, or other evidences of debt, as were then held by the bank, is wholly untenable. The intention of the legislature was to pass a general law, applicable to the bank, not only then, but in future. The phraseology upon which this criticism has been made, was employed by the legislature, to make the act apply to notes then held by the bank, and upon which suits had been commenced before the passage of the act ; the second section providing expressly, that where such suits had been com-

menced, they should not be reversed for want of such transfer by the cashier, but that the legal title should be deemed to have been in the bank, when the paper was discounted.

From this it follows, that no proof is necessary on the part of the bank, beyond the production of the note, unless the execution of the note is denied by a sworn plea, any more than is necessary where the note is made payable to the bank directly. It is in legal effect the same, as if the note was thus made payable, and this has been the uniform construction of the act ever since its passage. [Crawford v. The Br. B. at Mobile, 7 Ala. 383.] It is urged, that the court certainly erred in instructing the jury, that the allegations of the notice established the right of the bank to sue in its own name ; but although there may be a verbal inaccuracy in this, it could not possibly prejudice the defendant, as the court might, and should have instructed the jury, that no proof whatever was necessary under the pleadings, beyond the production of the note, and so in effect it did instruct them, in the concluding part of the same sentence ; "that it was not necessary for the plaintiff to show, that Holcombe was the cashier, or that the note was indorsed to the bank." There is no error in the record. Let the judgment be affirmed.

SHELTON v. SIMMONS.

1. A charge of stealing hogs, implies malice in the speaker, notwithstanding there is proof that the charge was currently reported, and believed in the neighborhood in which the parties resided. Evidence in mitigation of damages, is proper where the general issue alone is pleaded, and not where the plea of justification is also interposed.

Writ of Error to the Circuit Court of Mobile.

THIS was an action of slander, at the suit of the defendant in error. The words charged to have been spoken were, that the defendant had said of the plaintiff, *he had been in the habit of stealing and killing his neighbors' hogs*. The cause was heard on the pleas of "not guilty," and "justification," a verdict was returned for plaintiff, assessing his damages at one hundred dollars, and judgment was thereon rendered. From a bill of exceptions sealed at the instance of the defendant, it appears that the defendant prayed the court to charge the jury, that, if they believed the slanderous words charged to have been spoken, were, at the time they were uttered by him, currently reported and believed in the neighborhood in which the plaintiff and defendant resided; that the defendant believed them to be true, and uttered them without malice, they must find for the defendant. This prayer was denied, and the jury were charged that the words themselves implied malice.

E. S. DARGAN, for the plaintiff in error, insisted that the charge given was erroneous, and cited 1 Porter's R. 326; 9 Ib. 136.]

G. N. STEWART, for the defendant in error. The words charged to have been spoken, implied malice, (8 Porter's R. 488;) and no charge having been prayed or excepted to, as to what facts, or circumstances would mitigate the damages, the ruling of the court upon this point must be presumed to have been correct. The bill of exceptions will, if necessary, be taken most strongly against the party excepting. [6 Ala. R. 801.] As no part of the evidence is set out, the charge prayed must be considered abstract, and that given is not erroneous. [3 Mass. 546; 1 Pick. Rep. 1; 4 Conn. Rep. 408; 5 Cow. Rep. 449; 4 Wend. 659; 8 Id. 602; 13 Id. 9.]

COLLIER, C. J.—The bill of exceptions does not show error in the ruling of the circuit court. It is perfectly well settled, that it does not devolve on the plaintiff, in an action

of slander, charging words actionable in themselves, to adduce evidence of special damage, or that the defendant was influenced by malice in their utterance. These are implied from proof of the speaking of words, which entitle the plaintiff to damages. [8 Porter's Rep. 486.] The absence of malice, it is true, should be taken into consideration by the jury, in estimating the extent of the injury to the plaintiff's character; but where the words are spoken under circumstances inexcusable, the want of malice does not furnish a justification. It cannot be assumed from the record, that the circuit court laid down the law otherwise than we have stated it.

What has been said as to evidence in mitigation, we intend to apply to a case where the parties go to trial upon the *general issue* only, and not where the defendant pleads a *justification* also. The law would seem to be different where the speaking of the slanderous words is justified. [9 Ala. Rep. 406, and cases there cited.] The judgment is consequently affirmed.

PARK v. BANCROFT.

1. Where a deposition of a witness comes through the mail sealed, directed to the clerk of the proper court, with the usual post-marks, it may be published, although the name of the commissioner is not written across the seal.

Error to the County Court of Mobile.

At the trial of this cause, the plaintiff, Park, offered to read the deposition of a witness taken under a commission directed to James W. Wilson, and two other persons, direct-

ing them; or either of them, to examine the witness on interrogatories annexed to the commission. The same to be returned annexed to the commission, sealed up under their, or either of their seals. The envelope containing the deposition was tied with tape, and sealed with three seals of wax impressed with a stamp. On one side it was directed to the clerk of Mobile county court, Mobile, Alabama, and was indorsed with the title of the suit, and having what purported to be the usual post office stamp. On the other side, sealed, tied, and under the middle seal, but not across it, was written the name James W. Wilson, commissioner. No part of the tape was written upon.

The defendant objected to the deposition because the name of the commissioner was not written across the seals. The court sustained the objection, and the plaintiff having excepted, suffered a non-suit.

The exclusion of the deposition is now assigned as error.

SEWALL, for the plaintiff in error.

T. A. HAMILTON, contra.

GOLDTHWAITE, J.—In *Glover v. Millings*, 2 S. & P. 28, a deposition was held to be admissible, although received by mail, and without any superscription by the commissioners on the envelope, other than what was to be inferred from the direction to the clerk, and the post-office marks. It is obvious that the writing of a name across a seal, is no guard against imposition, unless we presume that the person who violates the seal, is not bold enough to counterfeit the name which previously was, or might have been there. If the package containing the deposition comes sealed to the custody of the clerk, by the ordinary course of mail, this is all which the common practice requires, and in our judgment is sufficient *prima facie*, to warrant publication.

Non-suit set aside, and cause remanded.

HEIFNER v. PORTER & SIMMONS.

1. "The south half of section 11, township 15, range 9, with the exception of eighty acres at the west end; and a lot donated for a school house, of land in the Coosa land district," is a sufficient description of the premises sued for, in an action of trespass to try title.

Error to the Circuit Court of Benton.

TRESPASS to try title, by the plaintiff in error. The land sought to be recovered, is described in the declaration, as the south half of section eleven, range nine, township fifteen, of land in the Coosa land district, with the exception of eighty acres at the west end, and a lot donated as a school house.

To this declaration the defendant demurred, and the court sustained the demurrer, and rendered judgment for the defendant, which is now assigned as error.

T. D. CLARKE, for the plaintiff in error. 1. The description of the premises sued for is sufficiently certain. [Adams on Ejectment, 18 to 26; Talbot v. Wheeler, 4 Day's R. 448; Hawn v. Norris & B., 4 B. R. 77; Sturdevant v. Merrell's heirs, 8 Port. R. 317, and cases there cited.]

2. It is sufficient to describe lands by the numbers, according to the survey of the U. S. [Sturdevant v. Merrell, above cited.] Here the description is by the number in the survey, and the exception of eighty acres, could be easily made by the sheriff, upon the suggestion of the plaintiff at his peril, and this is sufficient. [Adams on Eject. 21; Collingham v. King, Burr. R. 623; Conner v. West, Ib. 2672; Talbot v. Wheeler, 4 Day's R. 448.]

3. The exception "of 80 acres at the west end," is an exception of a legal sub-division of the section known in the survey, and could, without the least difficulty, be excluded in delivering possession; therefore, there is not the least un-

certainty as to the part to be excluded, and the part and number of acres really sued for.

4. The lot "donated for a school-house," excepted in the declaration, is in the nature of a *public privilege or easement*, and the sheriff should give possession, subject to the public easement. [Adams, 18, 19; 2 Johns. 357; Perley v. Chandler, 6 Mass. 454; Jackson v. Hathaway, 15 Johns. 467.]

5. The description must be regarded as of the entire half section, and the exceptions cannot vitiate.

A. J. WALKER, for defendants in error. The demurrer to the declaration was properly sustained. The description of the land is not certain to a *common intent*, nor is it such as would enable the sheriff to give possession, in the event of a recovery by plaintiff. The same objection is applicable to each count in the declaration. [Jenkins v. Noel, 3 Stewart's Rep. 60; Sturdevant v. The heirs of Merrell, 8 Port. 317.]

There is no such description of plaintiff's title, or allegation of his ownership of the land, as is necessary.

ORMOND, J.—We think the land sought to be recovered by this action, was sufficiently described in the declaration. It is stated to be the south half of a section, which is designated by its appropriate description in the land office, except eighty acres at the west end. Eighty acres is a legal subdivision of land, the boundaries of which are ascertained by the government surveys, and the exception of eighty acres, at the west end of the south half section, is precisely equivalent, to an exception of the west half, of the south west quarter of the section, and the consequence is, that the plaintiff sues for the remaining three eighty acre tracts.

The other exception, is "a lot donated for a school-house." We can not perceive how this can vitiate a description, which is in other respects precise and definite. It is merely an admission, that upon the premises sued for, there is a lot, which has previously been dedicated for the purposes of a school, and for which the plaintiff does not sue, or seek a recovery, though he may recover the two hundred and forty

acres covered by his declaration. This cannot possibly affect the defendant; for if the plaintiff is entitled to recover the entire tract, it is wholly unimportant to him, whether a donation has, or has not been made for a school-house. In the language of this court, in *Sturdevant v. Merrill*, 8 Porter, 323, it is only necessary to describe the land, with so much particularity, and precision, as will inform the defendant what he is to defend against, and the court for what it is called on to render judgment. That is done in this case, and the judgment must be reversed, and the cause remanded.

ELLISON, ET AL. V. MOUNTS.

1. A plea in abatement to an attachment, because it was issued without affidavit, and because the writ, though properly addressed, commands the plaintiff *eo nomine* to attach the defendant's estate, is bad, because it unites two distinct matters of abatement, and might be stricken out on motion. The defendant, therefore, in such a case, is not prejudiced by the refusal of the court to compel the plaintiff to join issue upon it.
2. The refusal to quash an attachment, is not revisable on error.

Writ of Error to the County Court of Walker.

THE defendant in error caused an attachment to be issued against the estate of the plaintiffs, returnable to the county court. At the return term, the defendants below moved to quash the attachment "for want of a sufficient bond, and other irregularities alledged by the defendants to be apparent on the face of the proceedings;" which motion was overruled and the plaintiff ordered to enter into a new bond. Afterwards, and at the next term, the defendant filed his plea in abatement, alledging that the attachment was issued without the plaintiff having first made an affidavit according to

the statute; and further, because the attachment, instead of being directed to any sheriff of the State of Alabama, and commanding him to attach the defendant's estate, requires the plaintiff himself to perform this service. The time when this plea was filed, was not indorsed as required by the twelfth rule of practice, and the plaintiff objecting to its reception, "as not filed within the time allowed for pleading, the court refused to compel the plaintiff to accept the same and join issue thereon." The defendants then offered to prove by the clerk, that the declaration was not filed at the appearance term; but this was denied by the court. Thereupon, the defendants pleaded *non assumpsit*, and the cause was submitted to a jury, who returned a verdict for the plaintiff, on which judgment was rendered.

P. MARTIN, for the plaintiff in error.

T. M. PETERS, for the defendant in error, cited 3 Stew. R. 172; 454; 9 Porter's Rep. 232; 1 Ala. Rep. 246; 2 Id. 287, 320; 3 Buls. Rep. 53; 7 Ala. Rep. 829; Clay's Dig. 610, rule 12.

COLLIER, C. J.—The refusal to quash an attachment, is not revisable on error. Instead of entertaining the motion, even where the suggestion upon which it is made is well founded, the primary court may put the defendant to a plea in abatement. A defect in the bond, or the want of a bond, as well as the error pointed out in the writ itself, may be corrected by the substitution of a proper bond, and the amendment of the writ, so as to require the sheriff to whom it is addressed to attach the defendant's estate, instead of commanding the plaintiff himself to perform this service. [Reynolds v. Bell, 3 Ala. Rep. 57; Massey v. Walker, 8 Id. 167; Johnson v. Wren, 3 Ala. Rep. 172; Lowry v. Stowe, 7 Por. Rep. 486; Alford v. Johnson, 9 Ibid. 320; Clay's Dig. 54, § 3.]

In Cobb v. Miller, Ripley & Co. 9 Ala. Rep. 499, we say that it is indicated by several previous adjudications, that the twelfth rule for the regulation of the "practice in the circuit

and county courts," which declares that "no plea in abatement shall be received, if objected to, unless by the indorsement of the clerk, it appear to have been filed within the time allowed for pleading," is not so imperative as to require a literal compliance with its terms. And it is strongly intimated that a defendant is not bound to plead in abatement of an attachment, until the plaintiff's declaration was filed. But if it be conceded that it were competent for the defendant to show when the declaration was filed, and that his plea was tendered in due season thereafter, and that the rejection of such evidence was revisable, in the present case we think no error prejudicial to the defendant has resulted from the ruling of the county court. The plea which the defendant offered, prays that the attachment be quashed for two distinct causes. 1. Because it was issued without an affidavit having been made, such as the statute requires. 2. Because the writ of attachment (though properly addressed) commands the plaintiff *eo nomine* to attach the defendant's estate.

In *Cobb v. Force, Brothers & Co.* 6 Ala. Rep. 468, it was determined that a plea which unites two distinct matters of abatement, is bad. This decision was re-affirmed in *Cobb v. Miller, Ripley & Co.* 9 Ala. Rep. 499. We have repeatedly held that pleas in abatement do not come within our statutes of amendment, and are not amendable according to the principles of the common law. As, then, the plea which the defendants filed was bad, and might have been stricken out on motion, or adjudged bad on demurrer, and could not have been amended, they are not prejudiced by the rejection of the evidence they offered to the court. It therefore follows, that the judgment of the county court must be affirmed.

BONNEAU v. DICKINSON & CO.

1. A plea in abatement because of a variance between the writ and declaration, is good, if the prayer is "of the writ and declaration, and that the same may be quashed."

Error to the Circuit Court of Lowndes.

THE writ in this case is in the name of A. A. Dickinson & Co., who are described in the declaration as being Achilles A. Dickinson and James Jones, partners in trading, doing business under the name and style of A. A. Dickinson & Co. The defendant, Bonneau, cravedoyer of the writ, and then pleaded the variance between that and the declaration, in abatement. The conclusion of the plea is, "Wherefore, the said defendant, on account of the said variance, prays judgment of the said writ and declaration, and that the same may be quashed," &c.

The plaintiff demurred to this plea, and the court sustained the demurrer.

This is now assigned as error.

H. J. JUDGE and Cook, for the plaintiff in error, cited *Turner v. Brown*, 6 Ala. Rep. 866.

LODER, contra.

GOLDTHWAITE, J.—In pleas of this description, the utmost certainty is required, and what in other pleadings is regarded as mere matter of form, in these, becomes matter of substance. One of the requisites of a plea in abatement is, that it shall point out and pray the proper judgment, and here it will be perceived the prayer is, that the writ and declaration may be quashed.

The declaration may be unwarranted in the form it appears, but there is no ground shown for quashing the writ.

The plea demands too much, and the decisions show this to be a fatal defect. [2 Saund. 209, d.]

It may be added, we have hitherto considered, on an appeal suit, that a defect of this nature in the warrant of the justice, was no ground of abatement. [Snow & Co. v. Ray, 2 Ala. Rep. 341.]

This, however, is my individual opinion only ; a majority of the court consider the plea as well pleaded, in praying judgment of the writ, as well as of the declaration.

The result of this is, that the judgment must be reversed, and the cause remanded.

COLLIER C. J.—Does not a variance between the writ and declaration abate the *suit*, and not the declaration only, and must not the judgment be thus rendered ? It is said that by departing from his writ, and filing a declaration for a different cause of action, the plaintiff abates it. [1 Bac. Ab. 18.] If the plaintiff has a cause of action conformable to his writ, he may, even after plea, obtain leave to amend his declaration, or after judgment against him on the plea, move to set it aside, and file a proper declaration. The mere abatement or quashing of the declaration, would have no other effect, than sustaining a demurrer to it, and would not affect the writ. If there is any thing in the analogies of the law or precedent, to support a judgment on the plea of variance, which did not impair the action of the writ, I would say, with deference, it has eluded my researches.

ORMOND, J.—It is the settled law of this court, that a variance between the writ and declaration, may be pleaded in abatement ; but if this were a new question, I should be disposed to hold, that such a plea could not be allowed, and that in accordance with the English practice, we ought to refuse *oyer* of the writ, as such pleas are purely vexatious, not calculated to advance the ends of justice, but merely promotive of litigation. But as it is too late now to retrace our steps, it becomes necessary to consider what is the character of the

plea, and what is the appropriate prayer, for it is settled law, that in such pleas, the prayer is matter of substance.

The objection here is, that the prayer of the plea should have been to the action of the declaration, and that the writ should not abate. There is a large class of pleas in abatement, which did not abate the writ, but merely suspended the right of the plaintiff to proceed at that time. Of this character were the pleas, that the plaintiff had been excommunicated—the parol demurrer of an infant, &c., most of which have become obsolete, and are considered at some length by this court, in the case of *Crawford v. Slade*, 9 Ala. 887. But it appears to me, this plea cannot be ranged under this head, but asserts that the plaintiff in the writ, and the plaintiff now prosecuting the writ, do not appear to be the same person; or to speak with more precision, that it appears by the declaration he is not the same person. This is clearly a variance between the writ and the declaration, and if this has any effect, it must destroy the writ. If the writ can be looked to for this purpose, what other effect can it have but an abandonment of the writ. Looking in to Bacon's Ab., title Abatement, under the head of variance between the count and the writ, it is said the plaintiff, by the variance, has abated his own writ, and although the cases cited in support of the text, do not appear to be very strongly in point, I can conceive of no other ground on which it could be held such a matter could be pleaded in abatement, and it follows that it must, if admitted at all, be in abatement of the writ. It results from this reasoning, that the prayer of the plea is correct.

ANDERSON & ADAMS v. BRIGHT & LEDYARD.

1. A judgment against a sheriff, on a rule by a judgment creditor for failing to make money, is no further binding on a junior judgment creditor, not a party to it, than that such a judgment was rendered, and for what amount. If the junior creditor can establish, that the property of the defendant in execution, would have yielded a sum, in addition to the amount found by the previous jury, for this amount, abandoned from neglect, or lost through the ignorance of the senior judgment creditor, he is entitled to a judgment.

Error to the County Court of Marengo.

RULE by the defendants in error, against the plaintiffs in error, sureties of one Curry, sheriff of Marengo county, suggesting, that by due diligence he could have made the money on an execution against one Price, for \$1,927, besides costs, which was delivered to the sheriff on the 29th June, 1839, and returnable on the second Monday of November, 1839.

The defendants offered in evidence, the record of a suit in favor of one Minor Woolley, against Curry as sheriff, and his sureties, from which it appeared, that an execution in favor of Woolley against Price, issued out of the circuit court of Marengo, for the sum of \$974 40, and was received by the sheriff, Curry, on the 9th May, 1839, and returned no property found. That Woolley instituted a rule against Curry, in the circuit court of Marengo, and at the fall term, 1846, of said court, by the verdict of a jury, recovered of the said sheriff and his sureties, the sum of \$318 66, it being found by the jury, that the sheriff could have made that amount from the said Price. They further offered evidence tending to prove, that the same identical property, now alledged, and attempted to be shown by the plaintiffs, to have been subject to their execution, was in proof, and relied upon by Woolley, as subject to his execution.

The defendants further offered in evidence to the jury, a certain other execution in favor of Woolley against Price, for over \$900, which was also received by the sheriff, Curry, on the 9th May, 1839, which was in the hands of the sheriff, at the same time with that of the plaintiffs. This execution the court excluded as evidence, and the defendants excepted.

The defendants, by their counsel, moved the court to charge, that under the facts as proved, the plaintiffs had no right to recover in the present case, except as to the value of any property, which Price might have had at the time both executions were in his hands, over and above the amount which might be necessary to satisfy Woolley's execution; which the court refused, and charged the jury, that in finding their verdict, they could deduct from the amount which they might find the sheriff could have made by due diligence out of Price, the amount found by the jury in Woolley's case, and as to any excess, or remainder, the plaintiffs had a right to recover it, notwithstanding the prior *lien* in favor of Woolley's execution.

Further, that if the sheriff, by proper diligence, could not have collected from Price, more than was sufficient to satisfy Woolley's execution, and that Woolley had proceeded to rule the sheriff, although he had only recovered the amount stated, that the plaintiff had not been injured by the act of the sheriff, and could not recover. This charge the court refused to give, and in substance re-affirmed its former charge. To these the defendants excepted, and now assign them as error.

F. S. LYON, for plaintiffs in error.

1. That as the executions in favor of Woolley against Price were older than that in favor of defendants in error against him, and as Woolley had made the sheriff *liable* for failing to levy upon and sell the *same identical property* relied upon by Bright & Ledyard as subject to their execution, that plaintiffs below had no right to recover. [See Gary, et al. v. Hathaway, 6 Ala. R. 161.]

2. That if all the property held by Price was subject to the older executions in favor of Woolley in the hands of the sheriff, at the same time with that in favor of defendants in error, and Woolley proceeded to render the sheriff liable be

fore the rule at the instance of Bright & Ledyard, that then the plaintiffs below were not injured by the sheriff, and they had no right to recover.

3. That the subject matter of the suit had been previously litigated in the rule at the instance of Woolley, and the property of Price subjected to an older lien in favor of Woolley.

4. All judgments are final and conclusive as to the facts litigated. The judgment in favor of Woolley as to the property involved in Bright & Ledyard's case, was final. [3 Phil. Ev. 830.]

MANNING, contra.

1. However binding the record of a suit may be between the parties, it is not binding upon strangers; and is only evidence of the *fact* of a recovery, and the amount. But certainly Bright & Ledyard are not concluded by the former recovery of other persons in a suit not conducted by their attorneys, nor sustained by the evidence of their witnesses, nor tried by a jury of their choice. They proved that the property subject to the execution was worth more than Woolley's witnesses or attorneys proved it to be worth, by twelve hundred and odd dollars, and recover for that excess only. Men's rights would be put strangely in jeopardy if they must be settled by suits in which they have no interest or control.

2. The execution was properly rejected, as is settled in the case of Bell, et al. v. King, 8 Por. 150. If a *levy* had been made of the property, and so an appropriation of it made to pay the amount of the execution, (which would be satisfied by the mere act of seizure of sufficient property) the case might be different.

But not only was *not* a levy made, but Woolley cannot even (as the bill of exceptions shows) recover any thing of the sheriff and sureties on account of the rejected execution, and in respect to the same property. For both of his executions came to the hands of the sheriff at the same time, and his recovery on account of one, in which he has tried the whole question in respect of the property pursued, concludes him from saying that the sheriff could have made more money out of the same property. So that the sheriff and his sureties are forever protected from any further recovery by

Woolley, on account of the same property. [Rakes' admr. v. Pope, 7 Ala. Rep. 161.] But Bright & Ledyard are not concluded from showing that the sheriff could have made more money out of the same property ; and, as before said, they get only the excess of its value after deducting what Woolley recovered.

The case shows the sheriff not only has not been before made liable for the whole value of the property, but also that now he can never be made liable for any more than its value.

The recovery by Bright & Ledyard was only of a parcel of the amount of the execution.

ORMOND, J.—The decision of the question made upon this record, turns upon the efficacy, and binding force, of the judgment against the sheriff, upon the rule instituted against him by Woolley. On the part of the plaintiffs in error, it is insisted, that it is an adjudication of the fact, that the property of Price liable to the satisfaction of the several executions in his hands, was only of the value of \$318 66 ; and that as this adjudication was made upon an execution, which from the fact of its having come to the sheriff's hands, before that of the defendants in error, and was therefore entitled to priority of satisfaction, is conclusive against them, their execution being at the same time also in his hands.

It is a rule of general, if not universal application, that judgments conclude only those who are parties, or privies to the proceeding. As strangers to them cannot be benefitted by them, neither are they prejudiced, or precluded from controverting any fact thereby established. The defendants in error were not parties to the proceeding instituted by Woolley, and so far from being in privity with him, had an interest directly adverse to him ; they are therefore on the clear, and well established principles of law, bound by it, no farther than that a recovery was had of a particular sum of money. The facts upon which the judgment is predicated, however conclusive they may be on the parties to the judgment, are not binding on them as strangers to it.

Rules against the sheriff, by different plaintiffs, between whom there is no community of interest, are wholly inde-

pendent of each other, although the judgments are of the same date, the executions came to the sheriff's hands at the same time, and the neglect, or default charged by all, relates to the same property, as is shown in the strong case of *Garey v. Hathaway*, 6 Ala. 161. When, therefore, the rule of the present plaintiffs, came to be tried, the only question was, what was the value of the property of the defendants in execution, which might have gone to satisfy the plaintiffs' debt; when they proved it would have yielded a certain sum, it was no answer that a jury in a different case, had placed a lower estimate upon it, and a judgment had been rendered for that sum in favor of an elder judgment creditor. If they were able to establish, that by a sale of the property, it would have yielded an additional sum, for this amount, abandoned from neglect, or lost through the ignorance of the senior judgment creditor, they were entitled to a judgment, precisely as they would have been, if they had levied on other property, which by superior industry they had discovered, after the elder judgment creditor had by *laches* lost his priority.

That there were older executions, sufficient to absorb the property, but which were not attempted to be enforced, is no answer to this judgment creditor, who is endeavoring to enforce his. [*Bell v. King*, 8 Porter, 147.]

Let the judgment be affirmed.

McLELLAND v. RIDGEWAY, USE, &c.

1. A judgment in favor of one partner, in a suit in which he alone is a party, is no bar or evidence of payment in another suit by the same plaintiff, against another partner, on the same cause of action. Whether it would not have been competent to have set up, and sustained by proof, the set-off, or payment, which enabled the other partner successfully to gainsay the

plaintiff's action, even if such payment, or set off, were made by, or were due to such partner in his individual capacity, *Quere.*

Error to the County Court of Mobile.

THIS was an action of assumpsit, at the suit of the defendant in error, on a writing by which Smith & McLelland acknowledged, on the 8th May, 1840, to be due to the plaintiff below, two hundred and ninety-five dollars, in Tombigby Rail Road money. The defendant pleaded, 1st. Non assumpsit. 2d. Payment. 3d. Set-off. 4th. That the plaintiff in this action, on the 2d day of October, 1843, in the circuit court of Noxubee county, in the state of Mississippi, recovered a judgment against the defendant and his co-maker, Smith, for the same identical cause of action for which the defendant is now impleaded; that the process in that suit was served on Smith alone, who pleaded, 1st, non assumpsit, 2d, payment, and issues being thereon joined, were submitted to a jury for trial on the merits; a verdict was returned in favor of the defendant for \$203 51, and this sum being remitted by him, judgment was rendered against the plaintiff for costs. All which will appear by the record proceedings, &c., not in any manner reversed and annulled, &c. This plea is in due form, and contains the proper allegations, if the judgment relied on is an available bar. The plaintiff took issue on the first, second, and third pleas, and demurred to the fourth; his demurrer being sustained, the cause was submitted to the jury on the issues, who returned a verdict for the plaintiff for the sum of \$208 33 damages, and judgment was rendered accordingly.

It appears from a bill of exceptions, sealed at the defendant's instance, that the facts alledged in the fourth plea, were proved on the trial. Thereupon, the court charged, that the record and judgment from the circuit court of Noxubee county, Mississippi, was only evidence that such a judgment was rendered, but being between different parties than those in this suit, was no evidence of the payment, satisfaction, relin-

quishment or discharge of the cause of action now sought to be enforced.

E. S. DARGAN, for the plaintiff in error, insisted, that the verdict in the case against Smith, in Mississippi, must have been upon proof of payment, or a set-off on notice under the general issue. No matter in which of these forms the defence was made, the debt was extinguished. The payment of a note by one of several joint makers or partners, amounts to a satisfaction by all, and either of them may avail himself of it. [1 Cow. Rep. 208 ; 5 Wend. Rep. 240.]

W. G. JONES, for the defendant in error. The fourth plea does not set up a good estoppel in favor of the defendant, because he was not a party to the judgment in Mississippi. [1 Starkie's Ev. 187, 191.] Under the pleas interposed by Smith, many defences might have been made personal to himself—as that the note was made by McLelland for his individual debt—that there was no partnership between them.

If the judgment in Mississippi had been against Smith, it would not be conclusive against the defendant in this action ; so being in favor of Smith, it cannot bar a recovery against McLelland. [1 Stark. Ev. 195 ; 1 Phil. Ev. 326-7 ; 3 Id., C. & H's, 815, 818 ; 2 Johns. Rep. 382 ; 3 Rand. Rep. 576.] The same matter presented by the plea to which the demurrer was sustained, arises again upon the bill of exceptions. No extrinsic evidence was offered at the trial, to show on what particular ground the jury found their verdict against Smith ; and it cannot, upon the record of that case alone, be inferred that the defence set up was available to the defendant below.

COLLIER, C. J.—There can be no question but the payment of a note or other liability, by one of several partners or joint promissors, shall enure to all. And whether such payment has been made by an advance of money, or by setting off or discounting notes individually due the party paying, is immaterial, if the liability has been discharged. But the important inquiry here is, whether the evidence offered

to establish the fact of payment, was admissible for that purpose.

It is said, that in general, no one can be bound by a verdict or judgment, unless he be a party to the suit, or be in privity with the party, or possess the power of making himself a party. If he come not within one of these categories, he has no power of cross examining the witnesses, of adducing evidence in furtherance of his rights, or appeal, and is deprived of the means provided by the law for ascertaining the truth ; and consequently it would be repugnant to the first principles of justice that he should be bound by the result of an inquiry to which he was altogether a stranger. [1 Stark. Ev. 191, and note 1, 1st Am. ed.] A record of one suit, it has been held cannot be used as evidence in another, on the ground that the defendant and one of the plaintiffs in the latter suit were parties to the former, and that the same point was in controversy in both ; another plaintiff and the person under whom both plaintiffs jointly claim not having been parties to the former suit. [Chapman v. Chapman, 1 Munf. Rep. 398 ; see Sanders v. Hamilton, 2 Hayw. Rep. 226, 282 ; Bond v. Ward, 1 Nott & McC. Rep. 201 ; Leather v. Poulteney, 4 Binn. Rep. 356 ; Burgess v. Lane, et al. 3 Greenl. Rep. 165.)

Persons in privity with either of the parties to the judgment, we have seen are bound by it, as if they had participated in the prosecution of the defence of the suit in which the judgment was rendered. But such are included in one of the following classes, viz : a privy in blood, or estate ; or in law. Without stopping to define the particular relation which each of these contemplate, it is perfectly certain that the defendant below does not come within either of these categories, in respect to the parties to the suit in Mississippi, [1 Stark. E. 192-3.]

Again : It is a general rule, that a verdict shall not be used as evidence against a man where the opposite verdict would not have been evidence for him ; in other words, the benefit to be derived from the verdict must be *mutual*. Where the parties are not the same, one who would not have been prejudiced by the verdict, cannot afterwards make use of it ; for as between him and a party to such verdict, the matter is *res novo*, although his title turns upon the same point, and the

verdict ought not to be admitted to prejudice the jury against the former litigant. Besides it is said, the verdict may have been obtained upon the evidence of the party who afterwards seeks to take advantage of it. [1 Stark. Ev. 195, and citations in notes ; 3 Stew. & Port. R. 369 ; 9 Id. 412 ; 3 N. Hamp. Rep. 415 ; 9 Conn. Rep. 23 ; 2 Pet. Rep. 186.]

In *Sturges v. Beach*, 1 Conn. Rep. 507, a bill was filed in chancery by S., claiming to be a creditor of the late firm of N. & B., dissolved by the death of N., against the executors of N., stating the insolvency of B. the surviving partner, and seeking satisfaction of his claim out of N's estate. The plaintiff offered in evidence a judgment in his favor in an action at law against B. as surviving partner. The court said it is a well known principle, that judgments are binding between parties and privies ; privies in blood, as heirs ; privies in law, as executors and administrators ; and that no man is to be concluded by a judgment when he was not a party or privy, and had no opportunity to be heard. There was no privity between B. and the executors of N. The insolvency of B. authorizes a proceeding in equity against the estate of N. It is like a new claim originating against the representatives of N., and must be supported as such. If a judgment against the surviving partner is sufficient evidence of a debt against the representatives of the deceased partner, then this mode of making out the claim would be usually adopted, and many frauds and collusions might be practised, which it would be very difficult to detect and expose. Hence it was concluded that the judgment was no evidence of a debt against the defendants.

If Smith, instead of defeating a recovery against him, had been unsuccessful in the suit in Mississippi, it would hardly be contended that the defendant would have been estopped by such a judgment. Upon what principle, then, can he invoke as a bar to the present action, the judgment in favor of his co-partner ? If the judgment in the one case will not operate to his prejudice ; in the other, it shall not *proprio vigore* avail him as a defence when sued for the same cause of action. This is the obvious sequence from the principles we have stated.

The judgment, then, which the fourth plea relies on as a

bar, was not admissible for any other purpose, than to show, that such a judgment was rendered. Thus far influence was accorded to it. In sustaining the demurrer to the plea, and ruling as the court did as to the effect of the judgment, it follows that there was no error.

Whether it would not have been competent for the defendant to have set up and sustained by proof the payments or sets off which enabled his former partner successfully to gainsay the plaintiff's action—even if such payments or sets-off were made by, or were due to that partner in his individual capacity, we will not undertake to consider. Nor will we stop to inquire what proof would be sufficient to make out such a defence. We merely determine the point presented by the record, as to the effect of the judgment set up by the plea and offered in evidence. It results from what has been said, that the judgment of the county court must be affirmed.

KINNARD v. THOMPSON.

1. A deed conveying property in trust *absolutely* for the benefit of specified creditors, if *bona fide* is valid as a conveyance in consequence of the presumed assent of the creditors, and is not a mere power, subject to be defeated by the levy of an execution at the instance of one of the creditors named in it.

Writ of Error to the Circuit Court of Sumter.

DETINUE to recover certain slaves. The plaintiff, Kinnard, made title through a deed executed by S. D. Hooks, on the 11th April, 1845, to him, conveying the slaves in controversy with other property, upon certain trusts which will be hereafter stated. This deed recites that Hooks is desirous to raise money to pay off executions which otherwise can be met only by a sale of his property, which would destroy his

prospect of making a crop for the then present year. For this purpose Thomas Wright and Susan Hooks had joined with the grantor to draw a bill of exchange for \$1,600, of even date with the deed, payable ten months after date, to the order of David Hooks, on D., S. & Co. of Mobile; and one Rhodes, for the accommodation of the drawers and indorser, had agreed to guarantee to save the drawees harmless, if they would accept the bill upon the express condition that the drawers and indorser should stand bound to him for any loss or payment he should be put to on account of said guarantee, and that the said grantor should also secure him hereby against said undertaking.

The deed recites other indebtedness to Rhodes, by a note of the grantor, secured by Thomas Wright and David H. Hooks, as well as other liabilities incurred by Wright and other persons on behalf of the grantor; and then proceeds with the recital of other debts due from the grantor, amongst which is one due to Elliot Robins, which is said to be in suit in the county court.

After describing the property conveyed to Kinnard, the plaintiff, the deed declares the conveyance is upon trust.

1. That the property is to be held and applied to the full indemnity of the parties to the bill before named—to that of Rhodes, its guarantor, and to whomsoever may accept it or advance upon it—and then the note payable to Rhodes as before set out.

Secondly: after the full security and payment of said bill, and the other debts mentioned in the first class, then the property to be held and applied equally for the other named beneficiaries, except that a cause in favor of a bank therein described, is only to be paid in the event of its obtaining judgment against the grantor in the supreme court.

For the more full and certain execution of the trusts, as well as for the greater security of the beneficiaries, the trustee is empowered, at any time that he or Rhodes shall consider it necessary for the interest of the beneficiaries, to take possession of the property conveyed; and should the grantor fail to meet the bill, then Rhodes may direct the trustee to sell the property conveyed for the purpose of paying the same;

or should it become necessary to close the trust for the purpose of securing the other liabilities on it the deed secured, then such beneficiaries as may represent the greater portion of the sums secured, shall have power to instruct said trustee to sell: and said trustee, upon such notice, shall sell the property conveyed, either publicly or privately, as he may see best, for cash—if publicly, on thirty days' notice.

The deed also provides, that if the beneficiaries of the first class shall be paid, the trusts shall inure to the benefit of those of the second class.

The defendant, Thompson, seized the slaves in controversy, by virtue of an execution against the grantor, at the suit of Robins, one of the creditors in the deed recited, and the facts following were admitted, to wit: That the debts mentioned in the trust deeds were *bona fide*; that Thomas Wright and Susan Hooks, who were joined in the bill as drawers, and David H. Hooks, its indorser, as well as Rhodes, the guarantor, became such for the accommodation of the grantor, on the express condition they should be secured by a trust deed; that the execution of the deed and the making of the bill were simultaneous acts, and that these parties assented to the deed; that the bill was not paid by the grantor; that Rhodes instructed Kinnard to proceed and close the trust; that in obedience to this direction, the property was advertised for sale before and at the time of the levy; that the property remained in the possession of the grantor from the time of executing the deed until the levy; that the deed was *bona fide*. There was no proof that any of the beneficiaries of the deed, except the parties to the bill and Rhodes, had assented to the deed; and it was shown the execution in favor of Robins was for the same debt mentioned in the deed as due to him.

Upon these facts, the court charged the jury, that the execution of the deed under these circumstances was, as against Robins, only the execution [creation] of a power; that upon its face, and unexplained, the deed does not appear to be beneficial to Robins, and his assent to its provisions could not be presumed by the jury; that Robins having dissented from

the deed by levying his execution, the defence in the absence of other evidence, must prevail.

The plaintiff excepted to this charge, and it is now assigned as error.

SMITH, for the plaintiff in error, insisted the deed was nothing more than a security for a debt presently created, and in that view was free from objection.

GATES, for the defendant in error, made the following points:

1. Deeds of trust, made for the benefit of creditors, which postpone the debts beyond the day of payment, are inoperative, unless assented to by *all* of the creditors intended to be secured. [Lockhart v. Wyatt, 10 Ala. Rep. 231, and Hodge v. Wyatt & Houston, Ib. 271; Elmes v. Sutherland, 7 Ala. Rep. 262.]

2. The case of *Dole v. Bodman, et al.* 3 Metcalfe R. 139, asserts it to be the law that no deed of this character is operative as a conveyance until the beneficiary or beneficiaries assent to it. It must be clearly beneficial and unconditional before the assent of the beneficiary be presumed; in this case, there can be no presumption of assent, for the sheriff justifies by virtue of a levy made by him on the property here conveyed, by virtue of an execution in favor of the beneficiary, Robins, against Hooks, the grantor.

3. The deed in this case is not unconditional—witness one of the inducements recited for making the deed; to wit, the raising of a crop, &c. See also, the conditions imposed with regard to the manner of closing the deed; Rhodes might cause it to be closed, or a majority of the beneficiaries, who represent the larger claims. This provision might operate with extreme hardship upon the smaller creditors, had they assented to it. And it could certainly afford no presumption of assent on their part.

4. The fact, that some of the debts were created simultaneously with the deed, cannot change the character of the deed. In the case of *Dole v. Bodman, et al.* 3 Metcalfe, 139, there, although the mortgage was not executed at the time of

the execution of the note, yet it was understood at that time, that the security should be given.

GOLDTHWAITE, J.—In *Elmes v. Sutherland*, 7 Ala. Rep. 262, we adverted to the distinction supposed to exist between a security executed concurrently with the creation or extension of a debt, and a voluntary conveyance by the debtor made for the purpose of inducing his creditors to give him delay, and held the latter was to be considered only the grant of a power which was revocable by the debtor, until the conveyance was accepted by the creditor. In the subsequent cases of *Lockhart v. Wyatt*, 10 Ala. Rep. 231, and *Hodge v. Wyatt*, *Ib.* 271, we held the power granted by such a deed was destroyed, when a levy was made before the assent of all the creditors was given; but in all these cases, it was clear from the deed, the debtor intended it to operate as a conveyance, only upon the event the delay stipulated for was given. The difference between the case at bar and those referred to, consists in the facts, that no delay is stipulated for by the debtor, and that the property conveyed is absolutely, and under all circumstances, devoted to the payment of the specified creditors. In this respect, it strongly resembles the cases of *Dubose v. Dubose*, 7 Ala. Rep. 235, and *Allen v. Montgomery and West Point Rail Road Co.*, December Term, 1846, when similar deeds were sustained against subsequent execution creditors. The decision of *Dole v. Bodman*, 3 Metc. 189, to which our attention is called by the defendant, proceeds on a doctrine which, however well established in England and in the courts of Massachusetts, has been repudiated in this court as well as in most others of the Union. The rule with us, is, that the assent of the creditor will be presumed when the assignment is for his benefit. [*Robinson v. Rapelye*, 2 Stewart 86; *Gazzam v. Points*, 4 Ala. Rep. 374; and is the same in the supreme court of the United States—*Brooks v. Marbury*, 11 Wheat. 73; *Tompkins v. Wheeler*, 16 Peters, 139.]

We do not question that Robbins, although secured by the deed, might refuse to accept its provisions; but his doing so cannot affect the rights of the other creditors, for whose benefit, as well as for his the deed was made. The

deed is not of that class which requires the assent of all the creditors named in it before it becomes operative as a conveyance, but is valid and operative from its execution, in consequence of the presumption of assent arising from its being beneficial to the creditors, to whom the property conveyed by it is devoted.

It being admitted the deed is *bona fide*, we think it clear the court erred in charging the jury it was the mere grant of a power, which the levy of Robins' execution defeated.

Judgment reversed and cause remanded.

CLARKE v. THE STATE.

1. The office of a physician, where he exhibited his medicines, received professional calls at all times, and being unmarried, ate, and slept, is not a public place, within the statute against gaming, the playing being at night, with closed doors, and a few friends present by invitation.

Novel and difficult question from the Circuit Court of Pickens.

SAMUEL Clark was indicted for playing at cards, in a public place. The evidence was, that the playing took place in the office of a physician, where he exhibited his medicines, received professional calls at all times, and being an unmarried man, where he also ate, and slept. The playing was at night, with closed doors: only a few friends were present, by invitation. The court held this was a public place, within the meaning of the statute, but reserved the question as one of novelty and difficulty.

ATTORNEY-GENERAL, for the State.

HUNTINGTON, contra.

ORMOND, J.—I incline to the opinion, that the evidence described such a public place, as is within the meaning of the act. The terms, “or any other public place,” employed in the statute, were designed by the legislature to include every place, where people are privileged to go without an invitation; or in other words, if it is not a private house, it is a public place; although, no doubt even a private house might become a public place, if upon a particular occasion, a general invitation was given to the public to meet there. The mischief designed to be prevented, was the exposure of the practice of gaming, or playing at games of chance, to indiscriminate observation, by which the young, and unwary might be led to engage in it, and it appears to me, this would apply to the office of a professional man, in a town, or village. It would not vary the case, that he being unmarried, it was also used as an eating, or sleeping apartment. But my brethren think, that although such might be its character in the day time, it could not be considered a public place at night, when the doors were closed, and those present were there by invitation:—That it must then be considered his private dwelling. It results from this, that the court erred, and its judgment must be reversed.

COLLIER, C. J.—Whether the office of a physician or lawyer, at a time when it is impossible for all persons to enter at pleasure, is a *public house*, is not a material inquiry in this case. I am willing, however, to concede that such is its character. But if such person invites a few friends to his office, either in the *day-time* or *night*, and closes the door so as to exclude all others, that he may spend a social hour at *cards*, or *dice*, with these friends, it ceases to be a *public place*, within the meaning of the statute on which the indictment is founded.

BOGGS' ADM'R V. BRANCH BANK AT MOBILE.

1. When an estate was declared insolvent, previous to the act of 1843, but no progress made in the settlement until afterwards, the subsequent action of the court should be regulated by the last act.
2. When a claim has been allowed, either by the orphans' court, or by commissioners sitting by commission as the orphans' court, if no exception is taken, it will be presumed on error, that proof was made of due presentment.
3. Under the act of 1843, partial settlement may be made, and decrees in favor of creditors of an insolvent estate, enforced by execution.
4. If no objection is taken by the administrator, to the action of the orphans' court admitting a claim, he will be understood as waiving all objections; and a paper found in the record, making objections to the claim, but not shown to have been brought to the notice of the orphans' court, or a demand of an issue by the administrator, cannot be noticed by an appellate court.
5. When the record does not show that the plaintiff to whom a claim is decreed, is not the proprietor, the presumption will arise, the necessary proof of ownership was made.

Writ of Error to the Orphans' Court of Perry.

H. DAVIS, for the plaintiff in error.

BROOKS and JOHN, for the defendant in error.

COLLIER, C. J.—In 1841, the plaintiffs reported the estate of their intestate insolvent, and publication was made requiring all claims to be filed on the first Friday in May, 1842; but no proceedings appear to have been had upon this order. Afterwards, on the first of May, 1843, the judge of the circuit court commissioned three individuals to make a settlement of the estate under the rules and regulations *then* prescribed by law. These commissioners made publication from time to time, and received, heard proof of, and allowed claims against the estate. Among these claims were two in favor of the Branch Bank, amounting in the aggregate to the sum of \$9,324 20, on which it was adjudged that \$4,662 10½ should

be paid, and that the bank should have execution therefor. The record shows that the estate was not finally settled.

It is insisted that it was irregular to make a partial distribution of the intestate's estate under the act of February, 1843, "to amend the laws now in force in relation to insolvent estates." [Clay's Dig. 192, *et seq.*] In *Martin, adm'r, v. Baldwin*, 7 Ala. Rep. 923, it was determined, that, where an insolvent estate was in process of being audited at the time of the passage of the act of 1843, for the settlement of estates in the orphans' court, the law previously existing will govern and control it; but where the initiary steps only have been taken, the proceeding so far as it has progressed, will be governed by the former law, but so far as subsequent action is had, it must conform to the act of 1843. [See also *Branch Bank at Huntsville v. Steele*, 10 Ala. Rep. 915.] In the case before us it appears, that no progress had been made in the settlement of the estate when the act of 1843 was passed—that only a report of insolvency had been recognized, and an order of publication made, which was never acted on. Under these circumstances, the proceedings should have been conducted pursuant to the act cited.

The record, it is true, does not state in so many words, that the claim of the bank had been presented to the administrators within eighteen months from the grant of the letters of administration; yet this is not a fatal error. The commissioners, in virtue of an act of the legislature, are substituted *pro hac vice*, for the judge of the county court, who is excused, because of his interest in the controversy. Their powers in respect to the matter in hand, are the same as those exercised by the judge in the performance of similar duties. [Clay's Dig. 305, § 46, 47.] It may be conceded, that the record should show that the matter was not *coram non judice*, and that the proceedings were regular; but need not recite *in detail the proof of every fact* that should have been shown, to entitle a creditor to an allowance of his claim, although the court may be one of limited and defined powers. If the claim had not been duly presented, or the estate was not chargeable with its payment, the administrators should have objected to it, and if overruled, have caused their exception to have been placed upon the record.

The sum allowed to the bank is not uncertain, as the counsel for the plaintiff in error supposes, and if the decree allowing it, is proper, we can conceive of no objection to the award of execution. If the act of 1843 does not *in totidem verbis*, direct decrees rendered under its authority to be thus enforced, does not the statute of 1830 invest the orphans' court with the power to enforce its decree, by the appropriate writ of execution? The third section, to say nothing of other more special provisions, enacts that "the county and orphans' court respectively, shall have full power and authority to issue writs of attachment, or other writs necessary to enforce their orders, judgments and decrees." [Clay's Dig. 305, § 49.] The orders and decrees, made under the act of 1843, as to the mode of their execution, are as much subject to the act of 1830, as if the terms of the latter had been embraced by it. Both of the statutes are in *pari materia*, and must operate together.

In the transcript there is a paper signed by counsel for the administrator, stating in form, a distinct objection why the claim of the bank should not be allowed. To which there is a response commencing thus: "and the said Gayle, in short, by consent, pleads and takes issue to the first objection above, &c.," and denies or admits and avoids each one of the others in consecutive order; but this paper is not signed by counsel, and does not conclude as a plea. There is nothing in the record to indicate that these papers were in any manner recognized by the commissioners, or even brought to their notice. It was clearly competent for the administrator, under the act of 1843, to object to the allowance of any claim against the estate, by filing in the clerk's office an objection in writing; "and thereupon the court shall cause an issue to be made up between such claimant as plaintiff, and the administrator or the contesting creditor, in the name of the administrator, as defendant, by pleading thereon, in the same manner as if the claimant had sued the administrator at common law; and such issue shall be tried as at common law, &c." (Clay's Dig. 194, § 11.) Although the administrator may have filed objections pursuant to the statute, still he should have called the attention of the commissioners to them, that they might have directed the appro-

priate pleading and issues. The administrator, in legal contemplation, was in court from the initiation to the close of the proceeding—at least on the days appointed for the action of the commissioners ; and if he desired the bank to plead to his objections, that they might be passed on by a jury, he should have objected to the decree of the court, until a verdict was rendered. But having acquiesced in its action, without the intervention of a jury, he cannot be heard to insist that his objections were disregarded—not having pressed them at the proper time, or shown by the record that the court refused to entertain them, he must be taken to have waived them.

As for the objection that the record does not show that the Branch Bank was the proprietor of the claim upon which a decree was rendered in its favor, it is enough to say that it does not prove the reverse. This being so, what we have said as to the absence of proof of the presentation of the claim to the administrator within eighteen months, will apply with all force, and show that the point is not well taken. This view is decisive of the cause, and the decree is consequently affirmed.

SIMS v. KILLEN.

1. The grantor in a deed is a competent witness to impeach it for fraud, if he was not interested in some way to render him incompetent on that ground.

Writ of Error to the Circuit Court of Sumter.

TRESPASS to try titles to a certain tract of land. At the

trial, the plaintiff, Sims, made title to the land in controversy under a sheriff's deed, conveying to him the title of one Jacob Sims. The defendant made title under a deed of trust executed by said Sims to one Pettigrew, through a sale made by one Thomas, his successor in the execution of the trust. The plaintiff offered the deposition of said Sims, for the purpose of showing the deed executed by him was fraudulent. This deposition the court excluded, and the plaintiff excepted.

The exclusion of the deposition is now assigned as error.

GATES, for the plaintiff in error, insisted, that the grantor is not necessarily incompetent to impeach his own deed. If he has no interest to disqualify him, he should be admitted. [Manning v. Manning, 8 Ala. R. 138; Thompson v. Armstrong, 5 Ib. 383; Todd v. Stafford, 1 Stewart, 199; Jordaine v. Lashbrook, 7 Term, 601.]

SMITH, contra, cited Walton v. Shelly, 1 Term R. ; Johnson v. Cunningham, 1 Ala. Rep. 249.

GOLDTHWAITE, J.—The rule declared in Walton v. Shelly, 1 Term R. 296, that a party giving a security is not a competent witness to afterwards impeach it, was overturned in England, upon great consideration, in the subsequent case of Jordaine v. Lashbrook, 7 Term, 601, and has never been considered the proper rule in this court, though in some of the States, and in the supreme court of the United States, it has been acted upon with reference to promissory notes and bills of exchange. The American cases are numerous which decide that the grantor in a deed is a competent witness to impeach it if not interested. [Hudson v. Hurlburt, 15 Pick. 433; Jackson v. Frost, 6 John. 135; Simmons v. Parsons, 1 Bailey, 62; 5 N. H. 181; Wright v. Nichols, 3 Bibb, 298; 12 N. H. 524.] Although there are some decisions adverse to these, and founded on Walton v. Shelly, the weight of authority is, that the witness is competent. The decision of this court in Johnson v. Cunningham, 1 Ala. R. 249, has nothing to do with the question here presented, and

what is said there refers itself to the case of a grantor introduced to sustain the title.

Judgment reversed and cause remanded.

MAULL v. HAYS.

1. Although a slave has been lent, and continued in possession of the borrower for more than three years, without the registration required by the statute of frauds, if the owner resumes the possession, before any creditor of the borrower has acquired a *lien* upon it, it cannot be afterwards made subject to the debts of the borrower.

Error to the Circuit Court of Lowndes.

TRIAL of the right of property. The defendant in error, having obtained a judgment against Jacob G. Maull, on the 5th October, 1840, sued out an execution thereon, on the 2d June, 1846, which was levied on a negro girl named Betty, in the possession of the defendant in execution, which was claimed as the property of John T. Maull.

The facts, as shown by the bill of exceptions, are, that the slave went into the possession of the defendant, in February, 1840, by a loan from one Holmes, to his daughter, the wife of Maull, who was living with her husband, and continued to live with him, until her death, in 1844; which loan it was proved was made in good faith. That in the fall of 1844, Holmes took the slave into his possession, and kept her until the 25th November, 1845, when he conveyed her by deed to J. F. Maull, the son of the defendant in execution, and an infant under the age of twenty-one years. That after the execution and delivery of the deed, the negro, and the claimant returned together to the house of the defendant. That the judgment upon which the execution issued, was founded on a debt contracted before the negro went into the possession of the defendant. And that no execution issued

on the judgment, after the spring term 1840 of the court in which it was rendered, until that which was levied on the slave.

Upon these facts, the court charged in substance, that the slave was liable to the plaintiff's execution. To which the claimant excepted, and which he now assigns as error.

COOK, for plaintiff in error.

The defendant's *fi. fa.* obtained no lien upon the slave while in Mauil's possession under the loan to Mrs. Mauil. Between the parties no title whatever passed to J. G. Mauil, but admitting that a title did accrue to creditors, there being no fraud, there was a good and valuable consideration, in returning the slave and relinquishing title to the loanor. A sale by a defendant in execution when the lien does not exist is good. (In this case the right by three years had not attached when the *fi. fa.* was in the sheriff's hands.) A *fi. fa.* only binds the goods in the county, &c. [Pond v. Griffin, 1 Ala. R. 678.] The property of the debtor is not even divested by the lien. [Bondurant v. Buford, 1 Ala. R. 358; 2 Stew. & P. 390.] When the lien is not kept up, by regular renewals of *fi. fa.*, and third persons acquire rights, they may take advantage of the loss of the lien. It is fraudulent to delay executions. [5 Wh. Com. Law, 410, notes 1, 2.]

The second possession of Mauil was not in his own right, and was short of three years. To this loan J. G. Mauil was no party. The possession of the father is consistent with the title of his infant son. [Sewall, *pro ami*, v. Glidden, 1 Ala. R. 52; Sims v. Sims, 2 Ala. Rep. 117.]

There was no loan to Mauil, express or implied, as in the case of Myers v. Peck, 2 Ala. Rep. 648.

ORMOND, J.—The loan to Mrs. Mauil, was in legal estimation a loan to the husband, and the slave having come to his possession it will be in effect the same as if the loan had been made directly to him.

The question then is, whether, as the slave remained in the possession of the husband more than three years, without demand, or pursuit by due course of law, on the part of the lender, she is liable for the payment of his debts, after she

has been returned to the owner, no *lien* having been acquired by the creditor, whilst the slave was in the possession of the debtor. This depends on the proper construction of the statute of frauds. That portion of the 2d section applicable to the case, is to the following effect: "And in like manner, where any loan of goods, and chattels, shall be pretended to have been made, to any person, with whom, or those claiming under him, possession shall have remained by the space of three years, without demand made and pursued, by due course of law, on the part of the pretended lender, the same shall be taken, as to the creditors, and purchasers, of the persons aforesaid, so remaining in possession, to be fraudulent within this act, and that the absolute property, is with the possession; unless such loan, reservation, or limitation of use, or property were declared by will, or by deed in writing, proved and recorded as aforesaid." [Clay's Dig. 254, § 2.]

The statute does not confer the title on the borrower, after the lapse of three years, without demand made, &c., but subjects the property in his hands to the payment of his debts. It is then his possession, after the lapse of three years, on which the right of the creditor attaches, and if that is parted with, before the creditor acquires a *lien* on the property, he can no more follow it into the hands of the owner, than he could pursue property which the debtor had sold previous to his acquiring a right to levy an execution. This result must follow, because the resumption of possession by the owner, divests the right of the loanee, and invests him with the possession.

It is a necessary corollary from these propositions, that the suing out execution against one, who has loaned property in possession, before the three years have elapsed, creates no *lien* upon it, because it is not subject to levy and sale for his debts. The first execution therefore, gave the creditor no *lien* on the slave, and the second could confer no right, because, before it issued, the owner had regained the possession, and the right to sell the slave, as the property of the defendant, being dependent on the possession, was lost when that was parted with. These principles are in effect decided in *Boyd & Swepson v. Steinbach*, 5 Munf. 305; see also, *Myers v. Peck*, 2 Ala. 648, and the cases cited.

Whether the creditor would have a right to pursue the property, where the debt had been created during the continuance of the loan, and the possession resumed by the owner after the expiration of three years, from the time the loan was made, is a question we need not consider, as the debt in this case existed anterior to the loan.

The subsequent possession of the defendant, did not subject the property to sale for his debts, unless the conveyance by Holmes, to the son of the defendant, was merely colorable, not intended to vest the property in the son, but by the means of a pretended conveyance to the son, to give the defendant the right to use, and control the property. If the gift to the son was *bona fide*, he being an infant, residing with his father, the possession will be referred to the title of the son. [Sewall v. Gliddon, 2 Ala. 52.]

Let the judgment be reversed, and the cause remanded.

TERRELL v. THE BRANCH BANK AT MOBILE.

1. T executed a note in blank, and handed it to S, a director of the branch bank at Mobile, to be filled up with the sum of about \$500, and used in the renewal of a note of T, of the same amount held by the bank. S, in violation of the trust reposed in him by T, filled up the note for a much larger sum, and offered it to the bank to be discounted for his own use. The note was discounted by the bank, S sitting as one of the board of directors when the note was taken by the bank, but did not communicate any of the facts here stated to any other director. Held, that T was liable to the bank on the note.

Writ of Error to the Circuit Court of Mobile.

THIS was a proceeding by notice and motion, at the suit of the defendant in error, to recover of the plaintiff the amount of a promissory note, of which he was alledged to be the

maker. The defendant filed several pleas, and thereupon issues were made up and submitted to a jury, who returned a verdict for the plaintiff below, on which judgment was rendered.

On the trial, the defendant excepted to the ruling of the court. It appears from the bill of exceptions, that the plaintiff having read to the jury the note described in the notice, adduced evidence tending to show that some months previous to the date of the note, the defendant signed his name to a blank piece of paper, and delivered the same to Wm. A. Scott, that it might be filled up with a note for about the sum of \$500, to be used in the renewal or extension of a note made by the defendant for a similar amount, of which the plaintiff was the proprietor. For this purpose, as Scott well knew, the blank was placed in his hands. Some months afterwards, without the defendant's consent, Scott had the blank filled up for a much larger sum, and offered it to the defendant to be discounted for his own use. The note now sought to be recovered, is that which was thus offered—it was discounted without the defendant's knowledge and consent, and the avails paid to Scott.

It was further shown, that at the time this note was discounted by the bank, Scott was one of its directors, and acting as one of the board by whom the same was taken; but he did not communicate any of the foregoing facts to any other director.

Thereupon, the defendant prayed the court to charge the jury, that the knowledge of Scott of the circumstances under which the note was made and offered for discount, his connection with the directory, and presence when it was purchased by them, was in law a notice to them of these facts, if the jury believed the testimony. In answer to which the court charged, that under the circumstances narrated by the witness, a knowledge of the facts by Scott, although he was a director of the bank at the time, and one of the board by whom the note was actually discounted, was not in law notice thereof to the bank; unless he had communicated the facts to some other director: *Further*, that the facts and cir-

cumstances did not constitute a defence to the payment of the note.

W. G. JONES, for the plaintiff in error, made the following points :

1. Notice to an agent is notice to his principal, and this applies to corporations equally as to individuals. [Angel & Ames on Corp. 247.]

2. Where there are several agents, or a joint agency, (as of directors of a bank) notice to either of the directors, is notice to the bank. [A. & A. on Corp. 247; Bank U. S. v. Davis, 2 Hill's (N. Y.) Rep. 451; Fulton Bank v. N. Y. and Sharon Canal Co. 4 Paige, 127.]

3. The case of Lucas v. The Bank of Darien, 2 Stew. R. 280, 296, is not in point. What was there said on the subject of notice is a mere dictum. But in that case, it did not appear that J. Lucas was one of the directors who actually discounted the note. In this case, Scott was one of the directors who actually discounted the note, and acted as director in discounting it. In this, the two cases are clearly distinguishable.

J. W. LESESNE, for the defendant in error.

1. The fraud of Scott, in filling the note for a greater amount than intended by the makers, cannot affect the bank. Notice to one of the directors of a corporation aggregate, is not notice to the corporation. [Lucas v. Bank of Darien, 2 Stew. R. 289.]

2. There may be exceptions to this rule—as when the director received the notice affecting the particular business, while acting as the agent of the corporation in that business; as in the case of the Fulton Bank v. Benedict, 1 Hall's S. Ct. R. 557, when the director was one of a committee to inquire into the very note in question.

3. A bank is not bound by the fraudulent conduct of a director, who under pretence of getting a note discounted for a third person, passes the note to the bank for a discount to himself, and is entitled to recover on such a note. [Washington Bank v. Lewis, 22 Pick. 32; Angel & Ames on Corp. 247.]

COLLIER, C. J.—In *Lucas v. The Bank of Darien*, 2 Stewart's Rep. 321, after the dissolution of a partnership, one of the late partners offered for discount to the directory of a bank, of which he was one of the board, a note made in the firm name. The court said, it was unreasonable to suppose the partner offering the note made any disclosure to the directory, which would have rendered his application for a discount unavailing. *Besides*, to give the argument any plausibility, it must be supposed that as a director, he passed upon his own application—natural justice, sustained by that delicacy, common to all men, forbids such an idea. In respect to paper discounted for his benefit, his attitude in relation to the bank was changed—he then became a borrower, not a lender; and as he was passive, the directors who gave him an accommodation should not be affected by a constructive notice of any fact, which he individually possessed.

It was also said, that if an agent acquire knowledge of a fact while not in the discharge of his duties as such; but when engaged in other business, his principal cannot be presumed to have that knowledge. [See 2 Atk. Rep. 242; 3 Id. 294-650; 13 Ves. Rep. 120; 3 Mad. Rep. 280; Story on Ag. § 140, and citations in notes 1 and 2; 7 Greenl. R. 195; 10 Watts' Rep. 397.]

In the case first cited, the court inclined to think that *presumptive notice* should not be allowed, where the agent who had *actual* notice had no right to act in the matter to which it related; and that a notice to any number of the directors less than a majority of those acting, would not affect the bank; because a minority could not control its operations. [See 1 B. & C. Rep. 473; 3 B. & B. Rep. 147.]

The question whether, and under what circumstances notice to a director of a bank will charge the corporation, was largely considered in *The Bank of the United States v. Davis*, 2 Hill's (N. Y.) Rep. 451, and these points were determined, viz; That as a general rule, the principal is deemed to have notice of whatever is communicated to his agent, while acting as such in the transaction to which the communication relates. He is responsible for the fraud of his agent, if committed while transacting his business; and this whe-

ther he be sole agent, or one of several possessing joint authority. But notice to a director, or knowledge obtained by him while not engaged officially in the business of the bank, will be inoperative as notice to the corporation. In case of a joint agency, notice to either one of several, while engaged in the business of his agency, is notice to the principal. And the bank was held chargeable with knowledge of the fraud of one of its directors, and could not therefore recover upon a bill which was sent to him to be discounted for the benefit of the drawer, the former, who was at the time a member of the board which ordered the discount to be made, having received the avails, alledging the discount to be for his benefit.

In the *Washington Bank v. Lewis*, 22 Pick. Rep. 24, one of the directors of a bank who was authorized when money was abundant, to solicit and procure notes for discount, obtained possession of a note under the pretence of getting it discounted for the maker, at a time when money was scarce, and pledged it to the bank, for a loan made to himself and a prior debt due by him—the maker knowing that the director was authorized by the bank to procure notes for discount, only when money was abundant. It was held, that the director had exceeded his authority in the transaction, and the bank was not bound by his fraudulent conduct; and that, as he did not act in his capacity of a director, the note was recoverable of the maker. The court said, if the knowledge of a director could under all circumstances be regarded as the knowledge of the bank, it would follow, that if a director should procure a note to be discounted by the fraudulent concealment of material facts, which he was bound to disclose, or even by false pretences, the bank would have no remedy. If the director had been authorized to discount this note, and did discount it, the argument might hold good. It was conceded that whatever a director or other agent of a bank may do within the scope of his authority, would bind the bank so as to make it responsible to the person dealt with. But in the case before the court, the director was the party applying for the discount, and was not acting as director, nor could he with any propriety so act. “He was the party with whom the bank contracted in discounting the note, and to whom the money was paid; and it is perfectly clear that

this ground of defence cannot be maintained." In this case, as well as *The Fulton Bank v. Benedict*, 1 Hall's Rep. 480, 557, it seems to be supposed that directors are not necessarily agents of the bank, so as to charge the corporation with a knowledge of the facts they possess in respect to matters which interest, or might influence the action of the directory sitting as a board. See also Ang. & A. on Corp. 247, and citations in notes.

We have thus placed in juxtaposition the case of *Lucas v. The Bank of Darien*, and the decisions upon the same point in two of our sister States. It may be, that the case in 2d Hill, is opposed to the opinion of our predecessors; but however this may be, we will not stop to inquire. We have revised the reasoning by which they are each supported, and are perfectly satisfied that our own decision rests upon a sound basis; and in addition to this, is strongly confirmed by the supreme court of Massachusetts by an argument which runs all-fours with that employed by us.

It cannot be admitted that in receiving the blank of the defendant to be used for his benefit, Scott acted as the agent of the bank; and certainly he did not thus act in abusing the authority conferred on him by the defendant. But in filling up the blank for a larger amount than his authority required, and then offering the note for discount, he was in reality the representative of his own interest. *Pro re nata*, his powers as a director were suspended—he was contracting with the bank through his associates in the directory—he was borrowing, not lending its money—though a member of the board and present too, it cannot be supposed that he co-operated with them in purchasing paper of which he was the avowed proprietor; and whether he did or not, it cannot be presumed that he made any disclosure which would prejudice his application for a loan. The facts of the present case are in every respect quite as unfavorable to the intendment of the bank's knowledge of the circumstances under which the note was made, as they were in the case cited from 2d Stewart; and that case we think sufficiently vindicates the ruling of the circuit court.

This is confessedly a hard case, but such cases must con-

tinue to present themselves, until all men shall act upon the maxim, "Do what you ought, happen what may." The judgment must be affirmed.

LYON, ET AL. V. THE STATE BANK.

1. The deposit, by the maker of a promissory note, with the assent of the sureties, of cotton, with the agreement that its proceeds, when sold, should be applied in payment of the note, will not withdraw the note from the influence of the statute of limitations, although the cotton is sold, and the proceeds applied in payment after the maturity of the note, and within six years before suit commenced.

Error to the County Court of Tuscaloosa.

MOTION by the Bank for judgment against Lyon and Berry, as the sureties of one Oliver, on a note made by them, dated 24th December, 1838, payable the 1st of October, 1839. The notice is dated 22d October, 1845, but was not served until the 28th on Lyon, and the 5th November on Berry.

The defendants, with other pleas, pleaded the statute of limitations.

At the trial, the plaintiff produced a witness, who stated this was one of the cotton notes—that about the time it was executed, the principal delivered the bank a quantity of cotton, the proceeds of which were to be credited on the note. The cotton was shipped to Liverpool by the Bank, and on the return of the proceeds—on the 2d November, 1839—their amount is credited on the note. No recognition of the debt, or payment by either of the defendants, after the maturity of the note was shown to the jury.

On this state of proof, the court charged the jury, that when the Bank received the cotton, there was no payment,

but the payment was when the proceeds were received ; and the question was, did the bank receive these proceeds within six years from the maturity of the note. The defendants excepted to this charge, and now assign it as error.

MARTIN & HUNTINGTON, for the plaintiffs in error, cited *Bank v. Lanier*, 7 Ala. Rep. 595.

GOLDTHWAITE, J.—The notice in this case being dated, as well as served on the defendants, more than six years after the maturity of the note, it will be material to inquire what its effect is, as the commencement of a suit in preventing the bar of the statute of limitations. The only question then, which this record presents is, whether the deposit of cotton, to be sold by the bank, with the previous agreement that its proceeds, when received, should be credited on the note, will prevent the statute of limitations from running from the maturity of the note, although the proceeds are credited within six years. We state the question in the broadest manner, because it seems the parties considered the case as if certain agreements and stipulations which have been the subject of litigation and discussion in other suits were before the jury. We incline not to concur in the notion advanced at the bar, that these agreements and stipulations have become a part of the law of the land, or of the history of the State, so as to be recognized by the courts without proof. Considered as we have stated the question, it is the attempt to prevent the operation of the general statute, by showing an agreement contemporaneous with the contract, to extinguish the note by payments derived from collateral sources. If a payment is made by the principal debtor, after the maturity of the contract, this affects the sureties only as admission ; and as an admission does not prevent the statute from running. [*Lowther v. Chappel*, 8 Ala. Rep. 353, and cases there cited. It may be supposed a distinction exists, when a specific pledge of collateral securities is made by the principal debtor, with the assent of the sureties ; but whatever effect such a pledge would have, if made after the maturity of the principal contract, it seems to us it does not af-

fect the original contract when concurrent with it. If the law were otherwise, every contract secured by a mortgage, or pledge, would virtually be withdrawn from the influence of the statute; for it would be within the creditor's power to sell the pledge, or mortgage, and thus produce a credit on the principal engagement. No case has been cited where a doctrine of this sort has been held, and in principle it seems to be unsound. We should very much doubt whether even a subsequent pledge could be construed beyond an admission of existing indebtedness, at the time it was made, without reference to the period when the proceeds of it were actually applied.

We are clear in the opinion, that there is nothing in proof to prevent the bar of the statute, and that the court erred in its charge.

Judgment reversed and cause remanded.

MCCAIN'S ADM'X V. MCCAIN'S DISTRIBUTEES.

1. The orphans' court has no power to direct the sale of land, which has descended to the heirs, for the purpose of more equal distribution; and where after such an order is made, the title is vested in the heirs, the administrator has no power to proceed with the sale. *Quere*, is an order obtained by the administrator for the sale of land compulsory, and may he not for good cause, refuse to proceed, and sell?

Error to the Orphans' Court of Sumter.

THIS was an application to the orphans' court of Sumter, for a citation to the plaintiffs in error, to show cause, why she should not expose to sale a quarter section of land, the property of her intestate, pursuant to an order of court which she had obtained for that purpose.

The administratrix appeared, and for an answer to the ci-

tation, filed her plea, setting forth, that the land had been sold to the deceased in his life time, by one McCann, who afterwards died intestate. That no part of the purchase money had been paid by the deceased during his life time. That she had since paid the purchase money to McCann's administratrix, and had applied under the statute, to the orphans' court of Greene county, when the administratrix of McCann had been directed, to make title to the land, to the minor heirs of McCain; which title was made agreeably to the order, on the 18th June, 1845; and that the legal title is now in them, five of whom are under the age of twenty-one years. That the application for an order for the sale of the land, was made under a mistake, as at that time the land was not paid for, had greatly fallen in value since its purchase, and the equity therefore of no value.

To this plea the distributees demurred, and the court sustained the demurrer, and directed the administratrix to proceed with the sale. This order is now assigned as error.

Horr, for the plaintiff in error.

R. H. SMITH, contra.

ORMOND, J.—Our statutes, authorize the representative of a deceased person, to apply to the orphans' court for the sale of his land, either for the purpose of paying debts, or making more equal distribution among the heirs. The record does not disclose upon what ground the order of sale made in this case, was obtained, but it is admitted to have been for the purpose of distribution among the heirs.

We are not prepared to say, whether such an order as this is compulsory upon the personal representative, and whether even after it has been obtained, he may not for good cause refuse to proceed with the sale. Such an order may be asked for by mistake, as is alledged to be the fact here; on subsequent events, may in the opinion of the administrator, render such sale improper. But whether he may, or not, in his discretion, apply for such order, or when made, decline to

act upon it, we are clear that the administratrix in this case, properly-refused to proceed with the sale.

The statute does not give the personal representative the right to apply for an order to sell land, standing in the name of the heirs. Nor has the orphans' court power to direct a sale of the land, in that condition, for any purpose. The power is only given, where the land remains in the same condition as to the title, as it was at the decease of the intestate. In other words, the orphans' court may, for the purpose of more equal distribution, on the application of the administrator, direct a sale of land, which has descended to the heirs, but has no power, where the title of the ancestor has been divested, and made to the heirs. In such a case, if the heirs desire a partition of the land, they must apply to a court of chancery, and being minors, if a division cannot be equitably made in specie, the court will order a sale, and direct a division of the proceeds, providing the necessary guards against a sacrifice of the property. [Delony v. Walker, 9 Porter, 497.]

It is true; it does not appear when the decree of the orphans' court of Greene was made, by which the title to this land was directed to be made to the heirs; nor is it important, whether it was before, or after the decree of the orphans' court of Sumter directing the sale. If before, the orphans' court of Sumter had no jurisdiction; and if after, no sale could be made under the order, because the administratrix could convey no title. The acquisition of the title by the heirs, after the order of sale was made, was a virtual revocation of it, as a sale under it would have been nugatory.

From these considerations it follows, that the court erred in sustaining the demurrer of the heirs, to the plea of the administratrix, and its judgment must be reversed.

DESHA, SMITH & CO. v. HOLLAND.

1. A usage, that where cotton stored in a warehouse, was found to be in a damaged condition, the warehouseman should send it to a "pickery," to be "picked," and that the factor should be responsible for the expense of picking, is not unreasonable, or contrary to law.
2. It is not indispensable to the validity of a custom, that it be universally acquiesced in; it is sufficient, if it be general, and uniform.
3. The evidence to establish a custom, should show a certain, and uniform usage. Where the evidence is uncertain, and contradictory, the custom is not established.
4. A dormant partner is an allowable, but not an essential party.

Writ of Error to the Circuit Court of Mobile.

THIS was a suit instituted before a justice of the peace by the defendant in error, and removed by appeal to the circuit court, where the cause was tried by a jury, who returned a verdict against the defendants below, and a judgment being thereon rendered, they have prosecuted a writ of error to this court. On the trial, the defendants excepted to the ruling of the presiding judge. The plaintiff was introduced as a witness, and testified that in the month of February, 1846, and prior thereto, he was the proprietor of a cotton pickery in the city of Mobile, the business of which was to remove all the damaged cotton from a bale, so as to leave only that which was merchantable; that in the month and year above mentioned, two bales of damaged cotton were sent to the plaintiff's pickery by the clerk of the lessees of "Hitchcock's Press Warehouse," to be picked immediately, which was done accordingly; plaintiff was afterwards informed that defendants, as commission merchants, had stored the two bales of cotton in the warehouse, and he then charged them for the labor of picking. This demand the defendants refused to pay, and the present suit is brought for its recovery.

Plaintiff was not requested by the defendant, or any clerk or agent of theirs, except as above stated, to pick the cotton.

One Killduff was then carrying on a pickery in Mobile, and plaintiff knew that he was generally employed by them to pick cotton which they held as factors. On the day when the two bales were sent to the plaintiff's pickery, and before they were picked, Killduff called on the plaintiff and demanded the cotton, informing him that he was employed by the defendants to pick them; this demand was refused, unless Killduff would produce a written order from the defendants, and no such order was adduced.

Plaintiff also stated, that when this cotton was picked, his brother, Thomas Holland, was interested with him in the pickery, the ordinary business of which was carried on in his (the plaintiff's) name. The firm name of J. S. Holland & Co. was generally used in large money transactions and bank business; but bills for cotton picking were usually made out in the plaintiff's name alone, and the pickery was generally superintended by him.

The plaintiff adduced evidence tending to show that a custom or usage existed in Mobile among factors, warehousemen, pickers and others, engaged in the cotton trade in that city, that a warehouseman with whom cotton was stored by a factor, might, upon its being found "country damaged," or damaged before it came into the warehouse, (which was known by its being internally injured), send it to any pickery he thought proper, to be picked without the knowledge or consent of the factor. In such case, the factor paid for the picking. To the introduction of this evidence, the defendants objected on the ground, that if such a custom or usage existed, it was unreasonable, contrary to law, and therefore not a good or valid custom; but the court overruled the objection—the evidence was permitted to go to the jury, and thereupon the defendants excepted.

Plaintiff further proved by several factors, cotton brokers, clerks of the latter and warehousemen in Mobile, that when cotton which was sold was found damaged, it was rejected by the brokers unless it was put in order. Under such circumstances, when the damage was small, the number of bales few, and a country damage, the warehouseman's clerk frequently sent such cotton to a pickery to be picked—when cotton was thus sent, the factor generally paid the bills of the

picker, sometimes they were paid by the broker, who was reimbursed by the factor.

Defendants proved by one of their clerks, that although they had been long and extensively engaged in business as factors and commission merchants, he had never known them to acquiesce in the custom or usage sought to be established. They also proved by several other factors, warehousemen and brokers, who had for a long time done a large business in the cotton trade in Mobile, that the general custom in the city in regard to picking damaged cotton, was, after a lot of cotton was sold by a factor to a broker, for the latter to send his clerk to the warehouse to examine it, and if any part of it was damaged, the broker or his clerk notified the factor thereof, that he might examine the cotton, and if necessary, give orders to have it picked. These witnesses stated that they did not know of any custom or usage in Mobile, that the warehouseman, or his clerk, might send damaged cotton without the consent of the factor, to any pickery to be picked. They however stated, that they had generally paid the picker's bills under such circumstances, when satisfied they were proper; but did not consider themselves bound to pay them.

Defendants further proved, that upon storing the two bales of cotton, the warehouseman gave a receipt for them, stating that they were in good order. There was, however, proof tending to show, that they were damaged internally so as to make it proper to pick them. Plaintiff also proved, that the defendants had once paid him a similar bill to that sued on.

The court charged the jury, that the warehouseman is in law the bailee of the factor, and only legally bound to take care of produce placed in his hands. But although his agency is thus limited, it may be extended by custom so as to bind the factor. If they believed that it was the general and uniform custom in the city of Mobile, for commission merchants to pay for the picking of cotton damaged internally, which was sent by the warehouseman to the pickery, and that the cotton sent in this instance was of that character, they should find for the plaintiffs; but, if no such custom has been proved, they should find for the defendants.

Thereupon, the defendants prayed the court to charge, that, even if there was such a custom as the plaintiff insisted

on, it was not good and valid in law ; which prayer was denied : *Further*, that unless such custom, or usage, appears to have been universally acquiesced in by those engaged in the cotton trade at Mobile, it would not be good and binding on the defendants ; which prayer was denied, but the court added, that the custom must be general and uniform, though it need not be generally acquiesced in.

The defendants prayed the court to charge, that if Thomas Holland was interested with the plaintiff in picking the two bales of cotton, then he ought to join with him as a party in this suit, and for the non-joinder the jury should find for the defendants ; but the court held that as the amount was less than \$20—the suit instituted before a justice of the peace and no formal declaration necessary, the objection could not thus be taken advantage of. To these several rulings, the defendants excepted.

A. F. HOPKINS and W. G. JONES, for the plaintiffs in error, insisted—1. The custom or usage attempted to be shown by the plaintiff below, was not a legal custom, or binding on the defendants below. A custom or usage, to be valid and binding, must be *certain, uniform, reasonable*, and sufficiently ancient to be generally known, and must not be contrary to established principles of law. The usage relied on in this case is uncertain, not uniform, unreasonable, and contrary to law, and was therefore not valid, and the evidence of it ought to have been excluded. [Pierce v. White, 9 Ala. R. 563, and the cases there cited ; The Citizens' Bank v. The Nantucket Steamboat Co. 2 Story's R. 45 ; The Schooner Reeside, 2 Sumner's R. 569 ; Homer v. Dorr, 10 Mass. R. 26 ; Frith v. Barker, 2 Johns. R. 335 ; Collings & Co. v. Hope, 3 Wash. Cir. Ct. R. 149 ; Thomas v. Graves, 1 Reps. Const. Court, 309 ; Stevens v. Reeves, 9 Pick. 201.]

2. The omission of T. Holland, who was a partner in the business, and equally interested with J. S. Holland in the account sued on, was fatal. It makes no difference that it was a case before a justice of the peace. In proceedings before a justice of the peace, the misjoinder or nonjoinder of parties is fatal. [Smith & Hill v. Cobb, 1 Stew. 62 ; Moffet & Singleton v. Wooldridge, 3 Stew. 322 ; 1 Chitty's Pl. 10, 14.

15.] 3. One person cannot make another his debtor against his consent. [Weakley v. Brahan & Atwood, 2 Stew. Rep. 500.]

J. A. CAMPBELL, for the plaintiff in error. 1. Was there any thing unreasonable in the power and duty conferred upon the warehouseman as the agent of the factor? The local circumstances of the trade may render such a *usage* one of great propriety. The situation of the warehouses, the qualities belonging to warehousemen, and the convenience of factors, may render such care on the part of the warehouse-keeper important to the factor, and no reason can be given why it may not enter into the calculations of the parties, that the preparation of the cotton for sale by putting the bales in order, should not be made by the warehouse-keeper, as the agent of the factor. [2 Cowen & Hill's Notes, 1413, 1414; 1 Bailey, 553; Gibson v. Culver, 17 Wend. 305; 11 Johns. 107.]

2. Was it necessary for this usage to be universally known and acquiesced in? On this point the cases reported in 2 Peters, 148, 3 Greenl. 276, are directly in point. What evidence was necessary to sustain it? The court say that it must be uniform and certain, and generally acquiesced in. These are the terms in which the question of the existence of a usage is submitted to the jury. [1 Gallison R. 445; 3 Yeates, 318; 17 Wend. 305; 1 Carr. & P. 59; 9 Ala. 565.]

3. Was there any impropriety in bringing the suit in the name of John S. Holland? It was shown that he is the active and managing partner of the firm; that a firm name is not used in the pickery business; that it is only used in a class of transactions entirely different; that the contracts are made with John S. Holland, and that accounts are made in his name. It was not necessary to join Thomas Holland. [Story on Part. 171; 2 Gill & J. 171; 4 Cowen, 717; 3 Ib. 84; 4 Wend. 628; 4 B. & A. 437; 2 Taunt. 324.]

4. That an appeal or writ of error does not lie in this case. The claim before the court was for less than \$20, and it is not competent for this court to revise the terms on which it was submitted to the jury. [Clay's Dig. 314, § 10; Ibid. 315, § 12.]

COLLIER, C. J.—It cannot be assumed, that the custom which the plaintiff sought to establish was *unreasonable*, and therefore contrary to law. The powers of a factor in the cotton trade certainly authorize him to appoint an agent to examine the condition of cotton consigned to him for sale or shipment, and to invest such agent with authority to put it in a situation that it may be disposed of in the one mode or the other. If he think proper, he may appoint the bailee with whom it is deposited for safe keeping, to perform this service. It is for the interest of the owner of the cotton that the factor should possess such a power; for an internal damage in a compressed bale, we all know frequently extends itself very rapidly, so that if the factor was compelled to obtain a special authority in such case, the loss to the owner would be frequently increased, before the progress of the damage could be arrested. If then he may appoint an agent to act for him in each, or in all cases, where cotton is consigned to him, is not a custom which makes the warehouseman an agent *pro re nata*, altogether reasonable? It is but the substitution of a standing, continuous authority, as a substitute for one specially created as occasion may require, and its reasonableness, whatever may be said of its liability to abuse, cannot be pronounced against.

If the warehouseman be an honest and prudent man, it would really seem peculiarly proper that he should be authorized to cause cotton stored with him to be freed from *internal damage*. Such damage it is said, and generally credited, sometimes generates combustion. To prevent such a result, the warehouseman and his agents would be likely to exercise circumspection—discover the damage more readily than any one else, and thus be enabled to take the promptest measures to prevent its extension. *Besides*, their experience would soon give them facilities for making such discovery more readily than most other persons.

Assuming the existence of the custom which makes the warehouseman the sub-agent of the factor, we can conceive of no objection to its extension, so as to make the latter the debtor of the pickery, for separating the damaged from the merchantable cotton. In this view of the case, we think the evidence objected to, was properly admitted.

It is not indispensable to the validity of a custom, that it should be *universally acquiesced in*; for this would be to annul all customs as to those who were unwilling to abide by them. Instead of having the force of law, and being of general obligation, they would depend for their operation upon the gratuitous assent of every person against whom they were invoked. It is enough if a custom be "general and uniform."

In respect to the necessity of making Thomas Holland a joint plaintiff, we think, that although it would have been competent to join him, it was not indispensable to do so. The evidence shows, that in the business of the cotton pickery, he was merely a dormant partner, and the law is well settled, that in such case he is an allowable, but not an essential party. [See *Monroe v. Ezzell*, at the last term.] This view disposes of the case as presented by the record. But as it would doubtless be more satisfactory to the parties, and to prevent any misapprehension, we would remark, that looking to all the facts recited in the bill of exceptions, they fall altogether short of establishing a custom, such as that of which the plaintiff's right to recover is predicated. It is apparent from an examination of the evidence that it is contradictory, showing nothing like a certain and uniform usage, which is essential to its validity. [*Price v. White*, 9 Ala. R. 563; 3 Watts' Rep. 178; 1 Hill's S. C. Rep. 270; *Trott v. Wood*, 1 Gall. Rep. 443; *Buck v. Grimshaw*, 1 Edw. Ch. R. 147; *Consequa v. Willings*, Pet. C. C. Rep. 230; *Parrott v. Thacker*, 9 Pick. Rep. 426.] It is certainly true, that usages among merchants should be very sparingly adopted as rules of law, as they are often founded in mere mistake, and still more often in the want of enlarged and comprehensive views of the full bearing of principles, (2 Sumn. R. 377); and we would add, are not unfrequently intended to advance some particular interest at the expense of a large class of the community. Even where well intended, they are sometimes set up as a means of protecting selfishness and dishonesty.

But the *entire evidence, and its legal effect* is not submitted to our judgment. We have only to decide the questions raised upon the record for revision—this duty has been performed, and we have only to declare that the judgment is affirmed.

BRADFORD v. MARBURY.

1. A charge moved for, cannot be considered abstract, when there is any evidence before the jury to warrant the proposition.
2. If upon a sale of cotton, there is a stipulation to allow a credit for all over \$1,000 of the price to be paid, until returns for the cotton can be had from Liverpool, it is an agreement to wait for the residue until, by the ordinary course of trade, a sufficient time elapses for a shipment and returns. A mere gratuitous extension of the time of payment, made after the contract was complete, would not be binding.
3. When a credit is stipulated for, upon a sale of goods, suit cannot be brought before the time agreed on for payment. How far this principle may be modified, when the buyer obtains goods upon a fraudulent representation that paper given for them is good, when it is worthless; or when the buyer obtains possession of goods on condition of giving security, and afterwards refuses it, *quere*.
4. When testimony is too indefinite, and inconclusive, to warrant the court in saying that one thing or another is proved by it, it should refuse a charge assuming that certain facts are established.
5. When goods are delivered to a warehouseman, or carrier, indicated by the buyer, a delivery to the warehouseman, or carrier, is a delivery to the buyer, and it is at his risk when delivered, without notice, unless by the contract of the parties, he is to be notified of the fact of delivery.
6. A delivery to a warehouseman will be complete, although the seller should take the receipt in his own name, unless his intention in taking the receipt in his own name, was to preserve the right of property in himself.
7. When property is delivered to a warehouseman, indicated by the buyer, the right of property will vest in him, though the warehouseman may have a *lien* on the goods for his charges. Whether such a *lien* would in any case prevent the general property from vesting in the buyer, if the requisites of the sale were complete, *quere*.

Error to the Circuit Court of Coosa.

ASSUMPSIT by Marbury against Bradford, for goods sold and delivered.

At the trial, a witness for the plaintiff testified, that in September or October, 1844, he was present, when a conversation was had between the plaintiff and defendant, respect-

ing the purchase and sale of the plaintiff's crop of cotton, of that year. The defendant said, "I'll give you six and a half cents a pound for all the cotton you pick out by the 25th December." To this the plaintiff assented. The defendant then said, "deliver it to Hatchett," meaning the witness, who was known to both the parties as one of the partners in a cotton warehouse in Wetumpka, doing business under the firm of Hatchett & Bro. Nothing more was said about either the time of payment or the delivery of the cotton. It was proved the plaintiff's crop, amounting to 100 bales, was all picked out before the 25th December, 1844, and was delivered in good order, at the warehouse of Hatchett & Bro. except five loads of five or six bales each, before Christmas, and these five loads were delivered in January, 1845, the last load on the 18th of that month, and weighed. The aggregate weight was 48,520 pounds. The bales were delivered unmarked. The warehouse receipts were made out in the name of the plaintiff, and delivered to his wagoner—they came to his hands and were never delivered to defendant. These receipts were given in the following form:

Marks.	No.	Weight.	Ropes.	
L. M.	1	510	6	Received from L. Marbu-
	2	566	6	ry, six bales cotton, marked
	3	508	6	as per margin, and subject to
	4	506	6	order on this receipt, on pay-
	5	484	6	ing all expenses and advan-
	6	564	6	ces.

HATCHETT & BRO.

Wetumpka, 25 Nov. 1844.

It was proved to be the plaintiff's custom to brand his cotton with his name, and that his crop for several years previous to that of 1844 had been so branded.

Several other witnesses testified they had heard the defendant say, he had bought plaintiff's crop for that year, but gave no particulars of the terms of the contract. The witness first spoken of, also testified he was at the defendant's house, on the night of the 25th December, '44, and was told by him to ship the cotton when it should all be delivered

but he countermanded the order, on the suggestion of witness that he had better not ship until the defendant could go down with it himself.

It was proved the warehouse of Hatchett & Bro. with all the cotton delivered there by the plaintiff, was destroyed by fire, the 29th January, 1845.

Another witness for the plaintiff testified, he thought the cotton delivered was entered on the warehouse books in the name of the plaintiff, but that the usage was not uniform to make the books correspond with the receipts—that the cotton was always held liable to the warehouse charges; and the shipper of cotton looked to for payment of them in every case, unless there was a special agreement to the contrary—that no charges had been paid on the cotton in controversy. He and others testified, that it was customary at Wetumpka to transfer cotton in the warehouse, by a transfer of the receipt; but that they sometimes turned out cotton on the receipts, sometimes by written order, and sometimes, when they had confidence, on a verbal order.

Another witness called by the plaintiff, said he was at the house of the defendant, the 27th December, '44, when both the parties were there. In reply to a question by the plaintiff's counsel, he said, "I cannot say what was said about the delivery of the cotton;" when cross-examined he said "plaintiff said to defendant, that he should have to employ an extra force unless he could get longer time for the delivery of the cotton," and remarked to the defendant, that the longer the time the better for him, "as you will have the less storage to pay." The remark of the defendant in reply was, "that he could have longer time—that it was an immaterial matter, but he should not hold himself responsible for storage until the receipts were delivered." Witness was asked if plaintiff gave any assent to this, or made any objection, and answered he did not remember. During this conversation the parties seemed friendly. Defendant, in the same conversation, said he wanted the plaintiff to give him timely notice of the delivery of the cotton. Witness did not recollect what response, if any, was made by the plaintiff to this remark.

It was also proved, that sometime before Christmas, the

defendant paid to the plaintiff \$582 on account of the purchase of this cotton, and that the plaintiff, in conversation, sometime after the date of the contract as proved by the first witness, said defendant was to pay him \$1,000 down, and and that the remainder was to be waited for until the defendant could ship to Liverpool and get returns. It was also proved, that after the cotton was burned, the defendant denied that the loss fell on him, and refused payment, as not having been his, duly delivered, and this was before suit was instituted.

It was also in proof, that the parties lived within three miles of each other, and distant 28 or thirty miles from Wutumpka. This was all the proof in the cause.

The court charged the jury, "that the main controversy was, as to the true nature and extent of the contract between the parties, in respect to the sale of the cotton. The plaintiff insists that his contract was to deliver the cotton at Hatchett's warehouse—the defendant, that the delivery was not complete until the warehouse receipts were delivered. The jury should determine which is right. If the contract was for the cotton to be delivered at the warehouse, and it was so delivered, the loss must fall on the defendant. If the contract was, the cotton was not to be considered as delivered until the warehouse receipts were delivered, and they were not delivered, then it must fall on the plaintiff. The principle of law which governs the case is this—if one makes a contract for the purchase of personal property, and there remains some material act to be done by the seller to complete the contract, and a loss by fire occurs before the act is done, the loss falls on the seller. If every thing has been done by the seller which he contracted to do, the loss falls on the buyer. Did the plaintiff contract to deliver the warehouse receipts before the delivery of the cotton was to be esteemed complete? If so, and they were not delivered, the verdict should be for the defendant. On the other hand, was the contract to deliver the cotton at Hatchett's warehouse? If so, and it was thus delivered, the verdict should be for the plaintiff."

The defendant requested the court to charge the jury—

1. That if the plaintiff agreed to wait with the defendant for all but \$1,000 of the purchase money until he could ship

to Liverpool and get returns, and that reasonable time had not elapsed for such shipment and returns before the suit was brought, then they must find for the defendant, for all except \$1,000 and interest, deducting the payment of \$582.

2. That if by the first contract the cotton was to have been delivered at a particular time or place, and it was afterwards modified by giving the plaintiff further time for delivery, without specifying the particular time, then in order to constitute a delivery of the cotton on the part of the plaintiff, he should give notice to the defendant of the compliance on his part with the contract, before the property in the cotton would pass to the defendant, and before a right of action would accrue.

3. That if the cotton was burned sometime after it was stored with the warehouseman, under a contract stipulating no particular time of delivery, and was burned before notice given to defendant, of its being stored and delivered according to contract, then there was no delivery of the cotton to the defendant.

4. That if the warehouse charges of the cotton, or any part of it, was due from the plaintiff when burned, the cotton was not in a deliverable condition at that time, and the title did not pass to the defendant, and the plaintiff is not entitled to recover.

5. If by the first contract, the cotton was to be delivered at Wetumpka, at a particular time, and it was afterwards modified by an agreement giving the plaintiff further time to deliver the cotton, without specifying any particular time—and if it was further agreed, the defendant should have notice when the cotton was delivered, then to make a delivery, it should appear the plaintiff gave notice to the defendant, within a reasonable time, of a compliance on his part with the contract, before the property would pass to the defendant, and before the plaintiff would be entitled to recover.

6. That if the time for the delivery of the cotton was extended by the consent of the defendant, and upon that extension he required the plaintiff should give him notice of the delivery of the cotton, and if the plaintiff assented to do so, and if the parties lived within three or four miles of each oth-

er, and if the last part of the plaintiff's cotton was delivered on the 17th January, and notice was not given to the defendant, of the delivery, previous to the 27th, when the cotton was burned, then that this would not be giving notice to the defendant.

7. That if by the custom of merchants, in Wetumpka, a warehouse-keeper has a lien on cotton stored, for the charges and storage, and if the warehousemen were asserting their right to charges for storage on this cotton, and if by the contract defendant was not to pay storage fees before the plaintiff should deliver the receipts, then the cotton, so long as the charges of the warehousemen, on the cotton, anterior to the delivery of the receipts remained, would not be in a deliverable state, and until it was relieved from this incumbrance, the title to the cotton did not pass to the defendant, and was at plaintiff's risk.

8. That if by the terms of the contract the defendant was to have credit on a part of the purchase money, until he should receive a return of an account sales from Liverpool, and if an account of sales could not have been received from thence before April or May, and the plaintiff could not legally commence his action for such sum as was to be then paid, before the expiration of the credit, although the cotton was never shipped, owing to its destruction.

9. That if the plaintiff, on the 27th December, 1844, informed the defendant he could not deliver the cotton agreeably to the terms of his contract, and thereupon the defendant assented to an extension of the time for its delivery, but said to the plaintiff, you must give me timely notice of its delivery, to which the plaintiff made no objection or reply, then this would amount to an assent on the part of the plaintiff to give the notice, and if he failed to do so, in a reasonable time after its delivery, the title would not pass to the defendant, and the plaintiff could not sustain this action.

10. That if the plaintiff informed the defendant he would not be able to deliver the cotton agreeably to contract, without the application of an extra force, and said to the defendant a delay of the delivery would be an advantage to him, as he would have less storage to pay, and if the defendant assented to an extension of the time for delivery of the cotton,

but said to the plaintiff, he the defendant, was not responsible for storage until the cotton receipts were delivered, and if the plaintiff made no objection or reply to this statement, of the terms of the contract, then this would amount to an assent on the part of the plaintiff to the terms, as stated by the defendant.

11. That if there were charges for storage on the cotton, antecedent to the fulfilment on the part of the contract of the plaintiff, and if the warehouseman held the cotton before it was burned, subject to this charge, and if these charges existed at the time the cotton was burned, then there remained something to be done by the plaintiff, to free the cotton from this incumbrance, and until this was done, the cotton was at the risk of the plaintiff, and he could not recover in this action.

These charges were severally refused, and errors are assigned here upon the refusal.

MORRIS and MARTIN, for the plaintiffs in error.

STORRS and ELMORE, contra.

GOLDTHWAITE, J.—1. The defendant does not question the correctness of the general instruction, on which the cause was submitted to the jury, so far as that goes, but insists, he was entitled, from the proof to make the several points presented by his requests for distinct charges. To this the plaintiff answers, without admitting the correctness of the propositions advanced, that most, if not all of these, were properly refused, on the ground that they are abstract, in other terms, not called for by the evidence. If the case rested alone on the testimony of the first witness, there would be no room for discussion, as that makes out a naked sale, of which at most there would be a full performance on the part of the plaintiff by delivery; but the defendant insists this contract was essentially modified by the conversation between the parties on the 27th December, as well as that the admissions of the plaintiff indicate that the sale itself was made with a stipulation, that credit should be given for a portion of the price, until returns were or could be received from Liverpool. Whether the contract for sale was one for a credit, or whether it was modified in any material manner

by the conversation of which evidence was given, or whether the plaintiff assented to the modifications which it is insisted the defendant proposed as the equivalent for the delay in the delivery of the cotton, or whether, in point of fact, there was any delay, or whether this conversation applied to the whole of the cotton, or only the portion then not delivered, were all questions for the consideration and determination of the jury. For the court to undertake to pronounce that none, or which, or that any of these matters, were or were not established, was a judgment upon the weight of the evidence, which it was incompetent to give. It is at all times a question of much delicacy, to refuse a legal charge on the ground that it is not supported by evidence, but to do so when there is any evidence before the jury to warrant the proposition, is clearly erroneous. [Wiswall v. Ross, 4 Porter, 231; Harrell v. Floyd, 3 Ala. Rep. 16.] We think the objections to the charges, on account of their being abstract, cannot be sustained.

2. We shall now proceed to examine the several legal propositions which the different requests for instruction contain, but in doing this, shall endeavor to group them into classes. The first and eighth are sufficiently similar to be considered together. If the contract was to allow the defendant a credit, for all but \$1,000 of the price, until returns for the cotton could be had from Liverpool, it cannot, we think, be disputed that this must be construed as a stipulation to wait until, by the ordinary course of trade, a sufficient time had elapsed for a shipment and returns. And in this light the requests seem to consider it. If the admissions of the plaintiff connected themselves with the contract of sale, so that the credit formed a part of it, then there can be little question that a sufficient time had not elapsed between the delivery of the cotton and the 14th of March, 1845, (at which time the suit was instituted), for it to have been shipped and returns made. If, on the other hand, it was a gratuitous extension of delay, made after the contract was otherwise complete, there can be no pretence to say the suit is affected by it. [Ross. on Vend. 59; Stedman v. Gooch, 1 Esp. 5.] Which of these, or what was the proper inference from the proof, as we have before said, was determinable by the jury.

3. But the plaintiff contends that the denial by the defendant, that he was in any way liable to pay for the cotton after its destruction, relieved him from the necessity of waiting until the expiration of the credit, if one, in point of fact, was a part of the contract, to commence a suit to ascertain his rights. It must be confessed this proposition is deserving of great consideration. If it was conceded, that every seller upon credit is justly entitled to demand from the buyer an acceptance, which is the general course of trade in some commercial places, (Ross. on Vend. 53) or at least a sale note, or other memorandum in writing, ascertaining the terms of the contract, it seems well settled in England, and in the courts of the Union, that a neglect or refusal to do so, will not entitle the seller to an immediate action for goods sold and delivered, though it seems he may do so on the special contract. [Musser v. Price, 4 East, 147; Dutton v. Salomonser, 3 B. & P. 582; Ferguson v. Carrington, 9 B. & C. 59; Thompson v. Morriss, 2 Murphy, 248; Allen v. Ford, 19 Pick. 217.] There is a class of decisions which hold, that where the buyer has obtained goods upon a credit by a fraudulent representation that paper given for them is good, which turns out to be otherwise, that then the contract may be repudiated, and a new one implied to pay at once for the goods. [Bank v. Gore, 15 Mass. 79; Wilson v. Force, 6 John. 110.] So it has been held, when the buyer obtained possession of the goods, where the sale was on condition to give security, and he afterwards refused to give it, the seller might treat the sale as absolute, and sue immediately. [Corlies v. Gardner, 2 Hall, 345.] It should be remarked, however, that this last decision seems in direct conflict with Allen v. Ford, before cited, and many of the English decisions, unless there is a distinction between the refusal, and a neglect to give the security. The reason of the decisions is said to be, that the seller, by bringing the action for goods sold, &c., considers the contract of sale as existing, and that the law will not imply a contract where the parties have expressed their own terms. [Strutt v. Smith, 1 Crump S. C. Mus. & R. 315.] Assuming, however, the decision in Corlies v. Gardner, as declaring the true rule, and assimilating the refusal to give the security contracted for to a case of fraud, it will be evi-

dent this case is not within the principle. If the mere denial of liability will authorize a suit before the maturity of the credit, it would bring every case of disputed contract at once to an issue, independent of the time fixed by the parties for its performance. We are not prepared to say that such a rule would be a bad one, but it is certain it has no sanction in authority. We are, then, constrained to say, that if a credit was stipulated for, there could be no recovery except for the sum due according to the contract when the suit was commenced. In our judgment, there was no valid reason to refuse the charges to which this paragraph has reference.

4. The ninth request asserts the proposition, that the omission of the plaintiff to reply to the remark of the defendant, that timely notice, &c. must be given him of the delivery of the cotton, is to be construed as the plaintiff's assent to this as a condition. We think this cannot be sustained: though we are not prepared to say this *must* be considered as an assent, it is possible the jury *might* so consider it. It may be, however, that the plaintiff omitted to press his request further for delay, from the conviction it would be unnecessary, as only thirty bales were then undelivered. The objection to the request is, that the evidence bearing on this point is too indefinite and inconclusive to warrant the court in saying that one thing or another was proved by it. It is quite possible the whole of the cotton was delivered within the time contemplated by the parties when the contract was made, and if so, the just inference would be, that the proposition for delay was abandoned, and it might be otherwise if it was not so delivered. Nor is the hypothesis improbable, that neither party expected any consequences to flow from this conversation, unless there was a delay in the delivery, and then only as to the matter of storage.

5. The second, third, fifth and sixth requests are predicated on the assumption that notice of the delivery of the cotton was essential to charge the plaintiff, either under the contract as made in the first instance, or if modified by the conversation between the parties on the 27th December, so as to interpose the condition that notice should be given the plaintiff. If the contract, as testified by the first witness, was,

that the cotton should be delivered to the warehouseman indicated by the defendant, it is, in our judgment, a matter of no importance whether he was indicated as a warehouseman, or as the agent of the defendant. The general rule with respect to consignments to third persons, so as to place the property at the risk of the buyer, is, that notice shall be given, (*Goom v. Jackson*, 5 Esp. 112,) but where the carrier or warehouseman is named or indicated by the buyer, a delivery to the carrier, &c. is a delivery to the buyer. [*Dawes v. Peck*, 8 Term, 330; *Cook v. Ludlow*, 2 New R. 119.] If, however, the contract was in point of fact so modified afterwards, as to make it a condition that the plaintiff should give timely notice to the defendant of the delivery to the warehouseman, then the latter has the right to insist on this, as upon any term of the contract. We have nothing to do with the improbability that the jury could come to the conclusion that such a condition was made, either as to the whole of the cotton, or to that part not then delivered. It is sufficient to warrant the defendant in asking the charges involving this point, that there was evidence on it for them to weigh and decide upon.

6. In this connection, we may properly advert to an argument made in this cause, though the question does not seem involved in any of the requests, that the warehouse receipts being in the name of the plaintiff, there was no delivery to the defendant. Without entering upon the question, whether such receipts are negotiable, so as to pass the legal title by an assignment, we think it very clear that no question of law, decisive of the rights of the parties, arises out of this circumstance. The proper matter for the jury to ascertain was, whether the delivery of the cotton to the warehouseman was made on account of the defendant, or did the plaintiff cause the receipts to be taken to himself, to preserve his right of property? In this view, the concurrence, or the want of it, by the plaintiff, in requiring the receipts to be thus taken—the assumption by the defendant of the right to ship it—the payment of a part of the price, &c. were all facts bearing on the determination, which, in our opinion, was one solely for the jury.

7. All the other requests relate more or less to the question,

how far charges for storage, if any were due from the plaintiff, and constituting a lien on the cotton, prevented the title from passing to the defendant, until they were discharged. We think this is a question which the defendant is not permitted to raise, even if it is admitted the cottons were subject to liens, for charges which the plaintiff was bound to pay. The warehouseman was indicated by the defendant himself, and if charges accrued, he must have known of the general right of lien, and the title passed to him notwithstanding the lien. In *Philemon v. Curry*, 1 Camp. 513, and *King v. Meredith*, 2 Camp. 639, it was held that a lien for storage or transportation, to be paid by the plaintiff, did not prevent the property from passing when the other essentials of delivery were complete. To the same effect is *Taworth v. Moore*, 9 Pick. 347, and the cases cited by defendant, seem to contain nothing opposed to these decisions. Indeed, a different doctrine would work incalculable mischiefs, as there is scarcely any bulky article of commerce which is not at all times under some sort of lien, either for storage or transportation.

We come, then, to the conclusion, that the charges in this connection were properly refused; but independent of general principles, there is abundant proof in the cause to warrant the inference, that the warehousemen had waived any claim to their specific lien.

The court, however, having erred in considering there was not sufficient proof to warrant the charges which we have endeavored to show were unexceptionable as legal propositions, the judgment is reversed, and the cause remanded.

UPCHURCH v. NORSWORTHY.

1. A sole legatee has no right to the possession of the personal estate, until the personal representative has assented to it, and if in possession it may be recovered by the personal representative when appointed.
2. An administrator has no right to the proceeds of the crops made upon the land of his intestate, with the slaves of the estate, previous to the grant of administration. Whether he could not recover the value of the use of the slaves, and other personal property, *quere*.

Error to the Circuit Court of Pickens.

ASSUMPSIT by the defendant in error.

The facts, as shown by a bill of exceptions, are, that one Thomas Woolfolk, made his will on the 14th July, 1840, in the following words: "I give my wife every thing I possess during her widowhood, if she marries, she is to have one third. Not to give security when she qualifies, unless she marries, then to give security. Given under my hand this 14th July, 1840." Signed by the testator, and attested by two witnesses. The will was admitted to probate, on the 7th December, 1840, but neither the widow, or any other person was appointed, or qualified as administrator, until the 11th December, 1843, when the plaintiff was appointed administrator, with the will annexed, and qualified as such.

That Mrs. Woolfolk married again in December, 1843, having previously lived on the plantation, where her first husband resided at the time of his death, and was in possession of the estate, and effects. That during that period she employed the defendant as her agent, to transact her business. That as such agent he received sundry notes belonging to the estate of the deceased, the proceeds of which came to his hands. Also, the proceeds of a crop growing at the time of his death, and of three crops made on the plantation since his death, and there was no proof that he had ever paid

over, or accounted for the said several sums to any one. These being the admitted state of the facts, the defendant; by his counsel, requested the court to charge, that the plaintiff could not recover upon the case made by the proof, which charge the court refused, and instructed the jury, that if they believed the testimony, they ought to find against the defendant, such sums as thus came to his hands, to which he excepted; and which he now assigns as error.

BRODIE, for plaintiff in error.

BALDWIN, contra.

ORMOND, J.—Although the widow of the deceased, was by the will appointed sole legatee of the estate during her widowhood, that did not give her the legal title to the property, or entitle her to its possession, until the personal representative assented to it. It does not vary the case, that no representative of the estate was appointed until several years after the death of the testator; when appointed, the legal title to the personal estate vested in him, and by operation of law, the grant related to the time of the death of the testator.

These propositions are fully established, by the case of *Kelly, adm'r, v. Kelly's distributees*, 9 Ala. 908, and it follows, that the fact that the widow was the sole legatee during her widowhood, gives her no right to retain the personal property of the deceased, against the administrator who is invested with the legal title, and entitled to the possession, to enable him to pay the debts of the deceased, and distribute the estate. As she could not retain it herself, it follows necessarily that the defendant, who received it by authority from her, can be in no better condition.

This is exceedingly clear, as it respects the personal property of the deceased, which has come to the hands of the defendant; but a question of more difficulty arises, in regard to the product of the plantation, since the decease of the testator; he having died intestate as to his lands. As he died previous to the 1st January, the crop of that year is made assets by the statute, (Clay's Dig. 196; § 19;) but the

crops which have been made since, are not assets of the estate, recoverable in this mode by the administrator.

The title to the land descended to the heir at law, subject to the entry of the administrator, for the purpose of renting it. So also, the administrator is entitled to, and may sue for and recover rent accruing after the death of his intestate. [Masterson v. Girard, 10 Ala. 60; Harkins v. Pope, Id. 493.] But that is not the predicament of this case. This land has not been rented out, nor is this suit for the recovery of rent. It is an action for money had and received, to the use of the administrator, which, so far as it relates to the proceeds of the crops, made since the death of the intestate, can only be supported upon the hypothesis that the administrator had the right to affirm the act of the widow, in cultivating the land, with the slaves of the testator. This he could not have done himself, without first obtaining an order of the orphans' court for that purpose, nor can he affirm the illegal act of another. The product of the crops made on the land, cannot be assets of the estate, conceding that the widow would be responsible to the administrator for the value of the use of the slaves, and other personal property, since the death of her husband, and to the heirs, for the use and accupation of the land, questions which do not arise upon this record.

Let the judgment be reversed and the cause remanded.

KORNEGAY v. SALLE.

1. One joint maker of a note, not sued, is not a competent witness for his co-maker without a release.

Writ of Error to the County Court of Sumter.

THE defendant in error declared against the plaintiff on

two promissory notes for two hundred and fifty dollars each, to which *non-assumpsit* and *set off* were pleaded. From a bill of exceptions, sealed at the instance of the defendant below, it appears that he offered one Simmons, who was a co-maker with him of the notes declared on, as a witness, and proposed to prove by him, Simmons, that the notes were given to the plaintiff to compensate him for bringing a suit in chancery against one Beck, in favor of the defendant and witness; that it was agreed at the time they were made, that if the complainants did not succeed in that suit, then plaintiff was not to charge them any thing, but was to release them from the payment of these notes. It was admitted that Simmons was liable on the notes to the same extent that his co-maker was, and that they were unsuccessful in the suit in chancery, which was brought for them. The witness was excluded by the court, a verdict returned for the plaintiff, and judgment thereon rendered.

W. J. STEELE and J. METCALFE, for the plaintiff in error, cited 5 Ala. Rep. 383; 6 Id. 714; 8 Id. 504.

No counsel appeared for the defendant in error.

COLLIER, C. J.—It must be admitted that the precise question presented in this case, arose in *Thompson v. Armstrong*, 5 Ala. Rep. 383, and it was there decided, that one co-maker of a promissory note who was not sued, was a competent witness for another. The point certainly did not receive much consideration, and the decision was doubtless induced by the unsoundness of what was supposed to be the reasoning which influenced the decision in *Ross and wife v. Wells*, 1 Stew. R. 139. In this latter case, the court merely declare the conclusion that the witness is incompetent; but the argument at the bar, and the citations by counsel show, that this result was urged upon the ground, that the witness being a party to the note, could not discredit it. *Thompson v. Armstrong* was submitted to the court with a reference to our decisions, to show that this principle, at one time supposed to be founded in public policy, had been repudiated by

us, we denied the general conclusion of *Ross and wife v. Wells*, without stopping to consider whether it was not sustainable upon other reasons than those upon which it seemed to be placed. Under these circumstances we are inclined to consider the question of a joint maker's competency still open—uninfluenced by either of the decisions referred to.

In *Whatley & Gray v. Johnson*, 1 Stew. R. 498; *Lewis v. Post & Main*, 1 Ala. Rep. N. S. 65, and *Cawthorne v. Weisinger*, 6 Ala. Rep. 714, the joint obligor, or promissor, was offered as a witness by the plaintiff; and according to the authorities, such cases stand upon different grounds from those where the witness is introduced by the defendant. In *Anderson v. Snow & Co. et al.* 8 Ala. Rep. 504, three individuals were sued as partners; one of them pleaded—1. Non-assumpsit. 2. That he was not a partner with the other defendants who were sued with him, and a judgment by default was rendered against the other two. Upon the trial of the issues, a witness was introduced for the defendant, who, though not a party of record, was a member of the partnership. This court held that he was competent to testify for the defendant; that the judgment by default would stand, whatever might be the finding of the jury upon the issues, and that the witness, if the judgment were a charge upon the firm, would be liable to contribution: it was therefore his interest that the jury should return a verdict for the plaintiff, as in that event, the defendant who controverted his liability, would, if able, bear his proportion of the judgment, and relieve the witness to a corresponding extent. This case, we think, rests upon a solid basis, and is very fully supported by *Lovett v. Adams*, 3 Wend. Rep. 380.

There are cases where a joint debtor has been received to testify as a witness for the defendant, when, under the circumstances, he was not interested in the result of the suit. He is admitted for the plaintiff, unless he is called upon to prove a joint liability. And if released, or otherwise discharged of his interest, he is said to be equally a witness for the defendant; but without such release, it must be admitted that a great majority of the cases hold him incompetent. See *Hall et al. v. Cecil* and another, 6 Bing. Rep. 181; *Pike v. Blake*, 8 Verm. Rep. 400; *Pinney v. Bugbee*, 13 Id. 623;

Jewett v. Davis, 6 N. Hamp. 518; Spaulding v. Smith, 1 Fairf. Rep. 363. See also, the cases collected in 3 Phil. Ev. C. & H's Notes, 1520 to 1522. The reason assigned in some of the books for the rejection of the joint debtor is, that he is interested in defeating a recovery against the defendant, as he would be liable to contribute to him his proportion of the judgment, while others place it upon the ground of his liability to the costs.

Speaking for myself, I would say, that it never has occurred to me, that the objection that the witness was bound to contribute to the payment of the debt, or damages, for which the judgment was rendered, furnished a reason for his exclusion. The record would not conclude him as to the grounds upon which the judgment was recovered, and when sued for contribution, he might perhaps show that the joint contractor who had satisfied the judgment, had no cause of action against him. But however this may be, as a judgment in favor of the party for whom he had been called to testify, would not be evidence for him, the creditor might sue him, and show that he was liable to the full amount of the demand; and thus he would be charged even beyond what he could be forced to pay if the defendant was successful. The liability of one joint contractor to the payment of his proportion of the costs of a several suit against another, may perhaps be a sufficient reason for the vindication of the almost uninterrupted current of decisions which maintain the incompetency of the former to testify for the latter.

Under the influence of authority too resistless to tolerate freedom of inquiry, we are of opinion that *Thompson v. Armstrong*, *supra*, upon the question before us cannot be supported. And it follows from what has been said, that the judgment of the county court must be affirmed.

STEWART v. WEAVER.

1. A contract to bore a well at the rate of 1 dollar a foot for the first 500 feet—2 3-4 dollars for the next 100 feet—5 dollars per foot for the next 100 feet—and 8 dollars per foot for the remaining distance necessary to obtain water—the well to be put in the same finished order as the contractor's best finished wells—payment to be made 1 July, 1841," does not authorize the contractor to abandon the work, so long as it is practicable for him to continue boring, and the other party is willing he should continue.
2. The act of the employer's agent, in directing the persons in the workman's employ, to bore the well deeper, is not such an interference, as to authorize the contractor to abandon the work.

Error to the County Court of Dallas.

ASSUMPSIT by Stewart against Weaver. No declaration is found in the transcript, but the case seems to have been tried on the general issue to the common counts, and a special count on the contract.

At the trial, the defendant gave in evidence a written contract, entered into between the parties. This recites, that Stewart agrees to bore a well for Weaver, at the rate of a dollar per foot for the first 500 feet—2 3-4 dollars for the next 100 feet, making it 600 feet—5 dollars per foot for the next 100 feet—and 8 per foot for the remaining distance necessary to obtain water. Stewart to put the well in the same finished order as his best finished wells. Weaver to furnish provisions for the hands employed on the work, say, &c., and board Stewart and find his horse while employed at the work—payment to be made for the work 1st July, 1841.

The plaintiff proved, that under this contract, he entered on the performance of the work, and bored for water 672 feet. It was also in proof, that on the day the plaintiff's poles were drawn up, and he quit the work, water rose in the augur hole within 180 feet of the surface of the ground. It

was also in proof, that the overseer and agent of the defendant meddled and interfered with the plaintiff, in the business of the boring, in the manner following: On the 16th November, 1840, in the evening, the plaintiff said to the defendant's overseer and agent, that he had got to the second rock. The agent asked the plaintiff if he had got water. Plaintiff replied, he supposed it was about 100 feet from the top of the well. The agent then told him to go on and complete his contract, or he would lose his money for what he had done. The plaintiff replied it was impossible to go any further, but to satisfy the agent, the hands might peck longer. On the 18th November, the agent went to the well and found the hands still pecking; they had pecked about two inches that morning. The witness then ordered the hands, the plaintiff being absent, to put the drill to the bottom of the well, and by 11 o'clock they pecked 18 inches. About this time the plaintiff came up. The witness told him he could peck with all ease if the water was drawn off so that the poles would not float. The plaintiff said this was impossible. Witness then proposed to him 150 or 200 feet iron poles, of rod iron, and if that did not answer the purpose, the witness would pay for the iron. The plaintiff did not do this. The hands continued to peck, and by night had finished 18 inches more. The witness remained with the hands during that day, to satisfy himself it was practicable to peck through the rock. The plaintiff remained at the well about half an hour, when he rode away, but returned later in the evening, when he found the hands still at work. He appeared to the witness to be in bad humor, without any cause, and commenced beating one of his hands on some frivolous ground. Out of this occurrence, and from some remark made upon it by the witness, some unpleasant feeling arose between them, but nothing like a quarrel. Witness then left the well. The defendant requested the court to charge the jury, that the fact stated by this witness, did not amount to such an interference as authorized the plaintiff to abandon his contract, and sue upon the same. This charge was given, notwithstanding the plaintiff insisted the jury, and not the court, were the proper judges of what amounted to an interference.

The court also charged the jury, the plaintiff could reco -

ver nothing for his services, and work, unless it was shown he had fully performed his contract, or had been materially interfered with by the defendant or his agent.

The plaintiff excepted to these several rulings, and they are now assigned as error.

PECK, for the plaintiff in error.

LAPSLEY, contra.

GOLDTHWAITE, J.—1. The difficulty in this case is, to ascertain precisely what is the legal effect of the contract between these parties, as evinced by the writing itself—for we do not learn from the bill of exceptions, that any attempt was made by the plaintiff to show, the ordinary course of boring these wells is, that the employer risks the chance that water will be procured. Whether such evidence to explain the meaning of the written contract is admissible, it is not our purpose now to inquire. The question is, does the written instrument in evidence *prima facie* bind the defendant to pay the plaintiff a compensation for his labor, unless the well is finished? When all its terms are examined, we think it must be considered as an entire contract. It will be seen, the defendant stipulates to pay for a finished well. This compensation, it is true, is to be ascertained by certain rates for different portions of the work, but the aggregate sum cannot be ascertained until the work is so far done that water is procured; and although a certain time is fixed for payment, it seems this must be taken with the reservation that the boring should be then completed; for otherwise the contract involves the absurdity of agreeing to pay on a certain day, when at that day there might be no means to ascertain the sum to be paid. Considering this an entire contract, the law is well settled, the plaintiff is entitled to no compensation without an entire performance. [Phelps v. Sheldon, 13 Pick. 50; Sickels v. Pattison, 14 Wend. 257.] I speak not now of the cases where the workmanship, although incomplete according to the contract, is accepted, or used by the employer, in which event the equitable rule seems adopted, of allowing compensation according to the value of the workmanship. Nor is there any peculiar hard-

ship in holding an artificer as impliedly warranting, that his workmanship shall effect the object contemplated. Where a person is employed in a work of skill, the employer buys both his labor and his judgment; he ought not to undertake the work if he cannot succeed, and he should know whether it will or not. [Duncan v. Blundell, 3 Starkie's N. P. Cases, 6; see also, Hill v. Featherstonhaugh, 7 Bing. 569.]

There doubtless are avocations in which the results of labor are so uncertain, that it is not usual for the workman to warrant the attainment of the object, but if, notwithstanding the chance of failure, he chooses to stipulate to accomplish the object, or, what is the same thing, to receive his compensation when the object is finished, I know of no rule which awards him remuneration for his labor if he fails. It may be that the general course of artesian well-makers, is not to warrant the obtaining water without an extra compensation, but as I have endeavored to show, the effect of this instrument is a warranty. If, through mistake or otherwise, the instrument does not speak the true agreement of the parties, there is a proper mode of relief. This view of the contract disposes of the cause, and shows the court did not err in instructing the jury on the question of performance:

2. On the other point, we think there is likewise no error. What was done by the defendant's overseer certainly was no intermeddling, by which the plaintiff was hindered or prevented from carrying it on. It seems rather to have been an experiment, to ascertain if the further prosecution of the work was practicable.

We can perceive no error in the record. Judgment affirmed.

ORMOND, J.—This is a very obscure, and badly drawn contract, for the boring of an artesian well. It is probably one of those cases, in which parol evidence would have been admissible to explain the contract, by proving the custom of that region of the State, in which these wells are common.

We have, however, to expound the contract, without any other guide, than the dim light which the contract itself affords, and in my judgment, that does not establish, that Stew-

art was to warrant that water would be obtained, either to flow over at the surface, or at such depth from the surface as to be available for ordinary uses.

This, I think, is fairly to be inferred from the stipulations contained in the contract. Weaver agrees to pay a certain price per foot for the first six hundred feet, and "eight dollars per foot for the remaining distance necessary to obtain water." It is perfectly clear, that Stewart could not insist on continuing to bore after he had obtained water, and it would seem equally certain, that Weaver could not insist on his prosecuting the work, after he had penetrated to such a depth that there was no hope of obtaining water. Indeed, from the nature of the work, there must be a point, when it would be impracticable to bore any longer, though long before this point would be reached, all hope would be lost of getting water.

There is one term of the contract, and indeed almost the only one which is not ambiguous, utterly hostile to this indefinite prosecution of the work, at the instance of either party; and that is that the work is to be paid for by a stipulated period. The parties therefore certainly contemplated, that the experiment of getting water could be tested by that time, and that neither party had the right to insist on its prosecution for an indefinite period.

It is very improbable, that by promising to "put the well in the same finished order as his best finished wells," Stewart intended to warrant that water would be obtained. The contract shows, that great doubt was felt as to the result of the undertaking, and it is difficult to assign a reason why a warranty was not plainly expressed, if one was intended.

The true meaning of the contract, therefore, appears to be, that Stewart was to bore, as long as it was practicable to do so, and Weaver was willing he should continue. This was the construction put upon the contract, by the parties themselves, as we find the agent of Weaver, when Stewart wished to discontinue the work, insisting he could still go on with it; and demonstrating its practicability, by superintending the workmen himself for one day, and making considerable progress; and if Stewart refused to prosecute the work,

when it was practicable for him to continue, it was a breach of the contract.

The court, in substance, charged the jury, that if Stewart did not perform his contract, and was not prevented from performing it, by the agent of the other party, he could not recover. This was undoubtedly correct, and if either party wished the court to state what the law of the contract was, a charge upon that point should have been asked. [Leigh & Co. v. Lightfoot, 11 Ala. 934.]

The court did not err, in instructing the jury, that the conduct of the agent of Weaver, as proved, did not amount to an interference, authorizing Stewart to abandon the work.

There being no error shown upon the record, the judgment must be affirmed.

COLLIER, C. J.—Unassisted by extrinsic proof, it is difficult to interpret the contract of the parties, so as to determine with certainty its true meaning. I therefore waive the consideration of the question, whether the undertaking of the plaintiff obliged him, as a condition precedent to his right to demand payment, to obtain water available for ordinary purposes. However this may be, I think it clear, that as long as it was practicable for the plaintiff to perforate the earth in the mode contemplated, and the defendant was willing to receive and compensate his services, his contract obliged him to continue the effort to obtain water. If he voluntarily, and without the consent of the defendant, abandoned the enterprise, he cannot recover. There is nothing in the record to show that the plaintiff was compelled by the defendant to cease his operations, or that the latter assented he might do so.

NOTE.—This and the following Opinions of Judge GOLDTHWAITE, were pronounced by the Court after his decease.

GARY v. BATES, ET AL.

1. A motion against a sheriff, for failing to make money on an execution, which had issued in favor of a plaintiff, who, after the rendition of the judgment, had been declared a bankrupt, must be made in the name of the assignee in bankruptcy.

Error to the County Court of Mobile.

MOTION by the plaintiff in error against the defendant, as sheriff and his sureties, for failing to return an execution.

The defendant pleaded, that after the rendition of the judgment, and before the execution issued, the plaintiff had been duly declared a bankrupt. The plaintiff demurred to the plea, and the court overruled the demurrer, and rendered judgment for the defendant, which is the matter now assigned as error.

W. G. JONES. for the plaintiff in error.—1. The plea must be founded on the idea that by the provisions of the bankrupt act, the title and right to the judgment being divested out of the bankrupt, and vested in the assignee, no execution could be issued on it in the bankrupt's name; but some proceeding must be first had to make the assignee a party to the record. It is insisted that this is not necessary. Surely it cannot be supposed the assignment, by operation of law under the bankrupt act, has any greater efficacy than an assignment by deed, made by the plaintiff for a valuable consideration, would have. Yet, in that case, this court has expressly decided, that execution may issue on the judgment *in the name* of the plaintiff of record, though the assignee may control it, and receive the money, when made. [Brazeal, et al. v. Smith, 5 Ala. Rep. 206, 211.] This case is precisely in point, in principle, and relied on as decisive of the present case.

2. Whether the plaintiff has become a bankrupt, or not, is

a question which the sheriff has no interest or right to inquire into. His plain duty was to return the execution in due time. It is no excuse to him for this neglect of duty, that the plaintiff has become a bankrupt. Even if he has, the execution may be issued in his name, for the benefit of the assignee, or of any one who may have purchased the judgment at the sale of the bankrupt's effects. That such a defence as is here set up, cannot avail the sheriff, is shown by the cases of *Brazeal, et al. v. Smith*, 5 Ala. Rep. 206, 211, and *McRae v. Colclough*, 2 Ala. Rep. 74, 80, 82.

PHILLIPS, contra.—The right to the rule against the sheriff, for failing to return the execution, passed to the assignee in bankruptcy. [3 § Bankrupt act; *Sullivan v. Bridge*, 1 Mass. 511.]

The execution itself should have been sued out by the assignee, either in his own name, by *scire facias*, or in the name of the plaintiff to the judgment, on his application to the court. [*Hewitt, assignee, v. Mantell*, 2 Wils. 372; *Bibbins, et al. v. Mantell*, *Ib.* 378.]

If the suit was conducted in the name of the bankrupt, but for the use of the assignee, this should have been replied to the plea.

This is not like the case of *Brazeal v. Smith*, 5 Ala. Rep. 211, which was the assignment of a judgment: the court there place the decision upon the ground that there is no statute prescribing the mode by which the assignee may become party.

But the bankrupt act vests the legal as well as equitable title in the assignee, who is authorised to conduct the suit. Nor is it similar to those cases which deny the right of the sheriff to question the regularity of the execution. Here the objection is, that there is no one in existence entitled to proceed. Is not a defendant entitled to have some one on the record, liable for the costs?

Besides which, the court will see that the rights of the assignee are protected, and not permit suit to be conducted for the benefit of the bankrupt.

By the bankrupt act two years only are allowed to the as-

signee to wind up the affairs. If this demurrer is sustained, it would be difficult, if not impracticable to claim the protection of this statute.

ORMOND, J.—The bankrupt law, divests all property, and rights of property, of every name, nature, and description, out of the bankrupt, and vests it *ipso facto*, in the assignee. As to all his property, and rights of property, previously held by him, he is civilly dead, and the legal title thereto vested in the assignee. It follows necessarily, that as the assignee is the legal owner of the judgment, previously belonging to the bankrupt, he must also be entitled to any claim against the sheriff resulting from his default, or negligence in respect to that judgment, and being substituted in the place of the bankrupt, cannot enforce it against the sheriff in the name of the bankrupt, but must proceed in his own name, as he is clothed with the legal title, as well as being the owner of the beneficial interest.

And this creates the difference between this case, and *Brazel v. Smith*, 5 Ala. 206. The assignment of a judgment *in pais*, does not transfer the legal title, and consequently if any act is necessary to be done, to make the judgment beneficial, as the suing out of process upon it, &c., it must be in the name of the plaintiff, who has the legal title, and who therefore, by his transfer, must have authorized the use of his name, to make his assignment beneficial to the assignee. The transfer, by the operation of the bankrupt law, as we have seen, not only gives the beneficial interest, but also confers the legal title.

The sheriff cannot, it is true, object to an irregularity in the execution, or to the use of the plaintiff's name, in a proceeding against him, though he has parted with the beneficial interest in the judgment. But that is wholly unlike this case. If he is responsible to any one for the failure to return the execution, it is not to the bankrupt, but to another person who has the right to the beneficial interest, and having also the legal title, can alone sue for its recovery.

From this it appears the court did not err in overruling the demurrer of the plaintiff, to the plea of the defendant, and its judgment must be affirmed.

GARDNER'S ADM'R v. MORRISON.

1. A second mortgagee of a slave, may recover the slave of one claiming under the mortgagor, though the first mortgage was forfeited, when the second was executed, and the first is still unsatisfied.

Writ of Error to the Circuit Court of Lowndes.

THIS was an action of detinue at the suit of the defendant in error, to recover a female slave named Keziah. The cause was tried on the general issue, a verdict returned for the plaintiff below, estimating the value of the slave at \$350, and the damages for her detention at \$150, and judgment was thereon rendered.

From a bill of exceptions sealed at the defendant's instance, it appears that he offered evidence tending to show, that the slave in question was mortgaged by the plaintiff's mortgagor to one A. Harrison, for a sum of money still due, between four and six hundred dollars; that this mortgage was executed in 1842, and the debt intended to be secured, payable in 1844. It was further shown, that this mortgage was forfeited previous to the execution of that under which the plaintiff claims; that it was made in good faith, and the mortgagee claimed the benefit of it as a security.

It was also proved, that the slave was levied on by a *fieri facias* against the mortgagor, while she was in his possession, sold by the sheriff, and purchased by the defendant. The defendant prayed the court to charge the jury, that if the mortgage to Harrison was executed and forfeited before the plaintiff's mortgage was given; that it was *bona fide* and claimed by the mortgagee as a security for a subsisting debt, then the plaintiff was not entitled to recover in this action. This charge was refused, and the jury instructed that the first mortgage, and the rights of the mortgagee therein, should have no influence upon their verdict; and if the jury were satisfied of the validity of the plaintiff's mortgage, they should find a verdict in his favor for the slave, with damages for her detention.

N. Cook, for the plaintiff in error. It was competent for the defendant below, to resist a recovery by proof of an outstanding title in a third person. [11 Johns. Rep. 529; 15 Id. 207; 8 Porter's Rep. 303.] Upon the forfeiture of a mortgage, the legal estate vests in the mortgagee. [2 Por. R. 435; 8 Johns. R. 96; 7 Cow. R. 290.] If there is an older lien undischarged, a junior mortgagee cannot recover. [9 Cow. R. 52.] The plaintiff acquired nothing by his mortgage, as the mortgage to Harrison was forfeited when it was executed. It is peculiarly proper that chancery should exercise jurisdiction in such a case. [4 Ala. R. 481.]

GILCHRIST, for the defendant in error, contended, that as between the mortgagor and other persons, he is considered as still having the legal estate in himself, and the power of conveying it to a third person, subject to the incumbrance of the mortgage. [Blaney v. Bearce, 2 Greenl. R. 132; Hitchcock v. Harrington, 6 Johns. R. 295; Collins v. Toney, 7 Johns. R. 278; Wellington v. Gayle, 7 Mass. R. 138; Eaton v. Whiting, 3 Pick. R. 484, 488.]

COLLIER C. J.—It is well settled, that a conveyance by mortgage passes the legal title to the mortgagee; unless by the terms employed, it is shown that it was not intended to have this effect, at least until after forfeiture. [Duval's Heirs v. McLoskey, 1 Ala. R. 708, and cases there cited.] The mortgagee is taken to be the owner of the fee, as against the mortgagor and all persons claiming under him; and as the right of possession follows the right of property, if there be no stipulation to restrain it, he is entitled to possession before condition broken, and is liable to be dispossessed only by performance of the condition. [See 2 Mass. R. 493; 8 Id. 551; 11 Id. 469; 3 Pick. R. 203; 11 Id. 475; 12 Id. 47-57; 14 Id. 399.] But it is said, that as against all persons except the mortgagee and those claiming under him, the mortgagor is considered as owner of the estate mortgaged, so long as he remains in possession of it. Before entry and foreclosure, the mortgage is deemed a pledge or lien upon the estate, subject to which the legal rights and remedies of others may be sought, asserted and enforced in the same manner as if no

such mortgage existed. . [7 Mass. R. 138, 355; 11 Id. 469; 15 Id. 278; 3 Pick. R. 484; 7 Johns. R. 278.] The interest of the mortgagor as it respects third persons is a legal estate, and he may convey it to such persons subject to the lien of the mortgage. [2 Greenl. R. 132; 4 Porter's R. 321. See also 2 Porter's R. 433; 6 Ala. R. 542.]

True, it was held by the court of appeals of Kentucky, in *Hume v. Breck*, 4 Litt. R. 284, that the execution of a mortgage, though the mortgagor retained possession of personal property thus conveyed, invested the mortgagee, even before forfeiture, with the *legal title*; and that a second mortgagee could not maintain an action for the recovery of the property against the first mortgagee, whose mortgage had been satisfied; and this although the mortgagor was in possession when the first mortgage was executed, and did not part with the possession until it was satisfied. It was admitted that the mortgagor would be estopped from denying that he had the legal title, but the first mortgagees were not concluded, it was said, from setting up such a defence, although their mortgage had been discharged. This decision, we think, rests upon an indefensible theory, and would hardly be supported in that State, at the present day. It is clear that the mortgagor, as against all persons but the mortgagee and those claiming under him, is regarded as the owner of the mortgaged property, and may mortgage it a second time or oftener; and if the first mortgagee has no claim upon it other than a satisfied mortgage gives, it is difficult to perceive of any reason, founded in principle or justice, why he should not yield it up. It was admitted that by the satisfaction of the mortgage, the legal title passed to the mortgagor, but said, that although this was the condition on which the first mortgagees acquired their lien, yet the mortgagor could not assign the condition so as to place the second mortgagees in his stead. This reasoning, though perhaps well founded in the English law, is altogether too recondite and attenuated to be recognized by many of the American courts.

The second mortgagee acquires the rights with which the mortgagor professes to invest him, subject, it is true, to the claims of pre-existing incumbrances, and when these are removed, he stands in the same predicament, not only as be-

tween the mortgagor and himself, but as it respects all other persons, as if they had never existed. We have repeatedly recognized the legal estate of the mortgagor in determining, that while in possession he has such an interest as may be levied on and sold under a *fiери facias*. And it has been often decided, that a subsequent mortgagee may discharge prior incumbrances, and thus give to his own mortgage all the effect it could have had, if these incumbrances had never existed.

But the case at bar, is not a controversy between a prior and subsequent mortgagee—it is a suit between the latter and a third person claiming under the mortgagor, and we have seen that the legal estate of the second mortgagee must prevail against all persons but a prior incumbrancer. The defendant, then, cannot call to his aid the superior legal title of the first mortgagee. The latter may or may not assert it, at his election, but one who comes in subsequently to both incumbrances, either by purchase from the mortgagor himself, or at a sale under an execution against him, cannot for his own benefit make the election for the first mortgagee. There is no privity which would enable him to set up such a defence. The fact that the first mortgage was forfeited when the second was executed, does not make a different rule applicable.

It is no objection to this conclusion, that the plaintiff's title is subordinate to that of the first mortgagee, and that the property may be recovered of him by the latter. This is a matter with which the defendant has no concern. The plaintiff may relieve himself from the lien of the first mortgage by purchasing it, or paying the debt for which it provides; or he may go into equity and foreclose, giving to the first mortgagee a preference in the payment of his demand. But whatever be the rights and remedies between prior and subsequent mortgagees, is unimportant to the defence set up. What has been said will sufficiently vindicate the ruling of the circuit court; and its judgment is consequently affirmed.

COOK v. DAVIS.

1. Under the act of 1843, allowing a creditor to appeal, &c., from a decision against him, on the allowance of his account against an insolvent estate, he cannot be heard unless an exception is taken to the decision at the hearing.
2. Nor can he take exceptions to irregularities in the proceedings previous to the final decree, unless he excepts to such irregularities before going into the settlement.
3. The act of 1843 does not impose upon the judge of the county court the duty of causing an issue to be made of his own volition between the creditor and administrator.
4. The affirmatory affidavit which the administrator, or another creditor in his name, may require under the act of 1843, should show something for which the estate is responsible as a money demand, or as ascertained damages. A receipt for a note on a third person, to be collected or returned, is not sufficient, unless the affidavit shows the estate is chargeable with some sum of money.
5. A note payable to a third person, will not support a claim unless the affidavit shows the claimant has either a legal or equitable interest in it.

Writ of Error to the Orphans' Court of Pickens.

THE supposed errors sought to be revised, are alledged to exist in the record, and proceedings, of the settlement of the estate of Joseph H. Harris, at the instance of Davis, administrator *de bonis non*. So much of the proceedings as are necessary to show the bearing of the errors assigned will be recited.

The administration *de bonis non* was committed to Davis, the 13th October, 1845, after the settlement of the accounts of the preceding administrator, and the estate was represented insolvent the 11th May, 1846. No schedule of the assets, or of the claims against the estate appear in the transcript, but an order was made, directing a publication of three weeks notice to the creditors, to appear and contest this representation. At the hearing—July term, 1846—no opposition being

made, the estate was declared insolvent, and the 2d Monday of September, then next, fixed for the administrator to make a settlement of his accounts, and for the election of a new administrator. It was also ordered, the creditors should be notified to file their accounts, duly verified, on or before the 2d Monday of January, 1847, and that the acting administrator file his accounts and vouchers at least forty days previous to the 2d Monday of April, 1847, for settlement and distribution of the assets of the estate.

No action of any kind seems to have been had on the 2d Monday of September, 1846, or at any other time, until April term, 1847, when the estate was finally closed, by a decree of distribution, in which it is stated that the claims of Wiley B. Cook were rejected.

What evidence was offered to sustain the demands, does not appear, but with the transcript is sent up a receipt of the intestate, which recites that he received a note from Cook, on Calvin M. High, for \$249, which note he was to collect or return. This receipt is verified by the affidavit of Cook, as just and true, and a disclaimer is added that he has received any thing on account of it. The affidavit is sworn to before a justice of the peace of Mississippi. This claim was objected to by the administrator, on the grounds—1. That it was not proved by the oath of the claimant. 2. Because the affidavit and certificates appended, were insufficient to establish a claim.

Another claim sent up in the same manner is a note signed by Harris, and dated 7th July, 1839, at one day, for \$669 64, payable to Jones, Cook & Co. This is verified by the affidavit of Wiley B. Cook, as just and true, with the disclaimer that he has not received any thing on account of it. This also was made before a justice of the peace of Mississippi, and the clerk of the court of probate certifies that he is justice. The judge of probate certifies that the clerk is clerk.

This was objected to by the administrator, that the claim was not verified by the oath of the claimants, or by any sufficient evidence to establish it.

Cook prosecutes his writ of error, and assigns that the court below erred—

1. In declaring the estate insolvent.
2. In decreeing a final settlement before the time for filing claims had expired.
3. In rejecting the claim of the creditor without directing an issue.
4. In proceeding to settle the estate without notifying the creditors to appoint an administrator.
5. In not allowing the claims.
6. In making a settlement before the administrator had filed his accounts, and without notice.

E. W. PECK, for the plaintiff in error.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—1. The act of 1843 provides, that “on the trial of any issue, directed to be made up and tried under it, either party dissatisfied with any decision, or charge of the judge trying the same, may except to such decision, or charge, and tender his bill of exceptions as in trials of suits at common law; and may, within twelve months thereafter, appeal from, or sue out a writ of error to such judgment as in suits at common law.” [Dig. 195, § 14.] Here the plaintiff in error does not bring himself within the spirit or letter of the statute, as no exception was taken to the action of the court, at the time of the decision, and consequently cannot now be heard to complain of errors which, it may be, passed without dispute at the time.

2. As, however, it may be supposed there is something in the errors assigned, unless they receive a passing notice, it will be as well now as at any other time, to express our opinion, that no party who appears in a testamentary suit, and submits to a final decree, without exception to previous irregular proceedings will be heard to complain, for the obvious reason, that his duty was to call the attention of the court in the first instance, to the supposed irregularities. If he omits to do this, no injustice is done him by presuming their waiver, so far as he is concerned. This, independent of any

other reason, would dispose of all the assignments of error, except those which question the correctness of rejecting the demands.

3. It is supposed by one of the assignments of error to have been the duty of the court, of its own volition, to cause an issue to be made up between the creditor and the administrator. The idea, we think, is at variance with the obvious intention of the statute, as shown by the section previously quoted, which seems to deny the right of revision when no exception is taken. Independent of this, the same phrase, "*shall cause an issue to be made,*" occurs in many of our other statutes, and we are not aware it has ever been construed to impose on the court the duty of representing both parties.

4. Exceptions to claims filed by creditors under the act of 1843, divide themselves into two classes. The first, as to the nature of the affirmatory affidavit, which is required to be made and filed by the claimant, at the time of filing the claim. [Dig. 194, § 10.] This affidavit, if no exception is taken to the claim, entitles it to be allowed without further proof, and when not made by the claimant, may be called by an exception from the administrator, or a creditor in his name. [Hollinger v. Holly, 8 Ala. 454; Brown v. Easley, 10 Ib. 564; Shortridge v. Easley, Ib. 520.] The other class includes all matters of defence to the claim, as asserted, and is the one chiefly adverted to by the statute, when it speaks of an issue. The decisions above referred to having settled, the administrator may require this affidavit from the claimant, it is a matter of some importance to determine what the affidavit must contain, and by whom it is to be made. It may be difficult to say, that any precise form will cover all cases, but there is none in arriving at the conclusion, the claim as presented must, in connection with the affidavit, show something for which the estate is responsible. If we test the first claim by this rule, it will be evident that neither the receipt nor the affidavit, nor both together, establish any matter for which the estate is responsible. It may be the creditor yet possesses the means of collecting the note mentioned in the receipt, or it may be wholly worthless. As to this demand,

there was nothing to elevate it into a claim, and its rejection was regular, even if an exception had been taken.

5. As to the other claim, it arises out of a note payable to Jones, Cook & Co., and there is nothing on the face of the paper, to show the plaintiff in error, is its holder, either by indorsement, assignment, or delivery. It is not even asserted in the affidavit, that he is the claimant of the sum due by it from the estate. Without undertaking to decide the claimant should show a legal title to the claim presented, we are clear the statute requires the affidavit to be made by some one claiming either the legal or an equitable interest in the claim asserted. In this particular, this claim is also unsupported, and its rejection would be sustained, if an exception had been regularly taken.

We are unable to see any error in the record. Judgment affirmed.

BROOKS & WILSON v. HARRIS, ASSIGNEE.

1. A suggestion by the plaintiff's counsel, of the bankruptcy of the party who instituted the suit, and the substitution of the assignee in bankruptcy as plaintiff, renders inoperative a plea of the defendant previously filed, alledging the bankruptcy of the plaintiff.
2. An allegation in the declaration, that the note on which the suit was brought, "was made by B, acting for himself, and as joint owner with W, of the boat," is not an allegation, that B had authority, as the agent of W, to execute the note in his name, so as to make the note evidence under the statute, unless contradicted by a sworn plea.
3. One part owner of a steamboat, has not the power to charge another part owner, by contracting debts in his name.

Error to the County Court of Mobile.

ASSUMPSIT by Charles A. Kelly, against the plaintiffs in

Brooks & Wilson v. Harris, assignee.

error, on the following instrument: "Mobile, 11 Oct. 1841. Due Charles A. Kelly, or bearer, three hundred and thirty dollars, 29-100, for work and labor done, on steamboat Jewess.

(Signed) for steamboat Jewess, and owners.

ALPHONSO BROOKS."

Upon which the following declaration was filed:

Charles A. Kelly, &c. complains of Alphonso Brooks, and Levin J. Wilson, joint owners of the steamboat called the Jewess, in custody, &c. For that, &c. on the 11th October, 1841, the said defendant, Alphonso Brooks, for himself and the said Levin J. Wilson, joint owners of the said steamboat, made his certain due bill in writing, bearing date, &c.; and thereby, and then and there, for himself and the said Wilson, as owners of the said steamboat, promised to pay the said plaintiff, the said sum of \$333 29. By means whereof, &c. There was also a count for work and labor.

The defendant Wilson pleaded, that since the making of the note, to wit, on the 20th January, 1842, the plaintiff was declared a bankrupt, by the district court of the United States. To this plea the plaintiff demurred.

When the cause came on to be heard, the plaintiff's attorney suggested to the court, that since the commencement of the action, the plaintiff, Charles A. Kelly, had been duly declared a bankrupt, under the bankrupt law of the United States, and that Ptolemy T. Harris, had been regularly appointed by the district court of the United States, the assignee in bankruptcy, whereupon the said P. T. Harris was by the court made the plaintiff in the cause. And the demurrer of the plaintiff, to the plea of the defendant Wilson, being sustained, a judgment was rendered in favor of the plaintiff, on the verdict of a jury.

A bill of exceptions found in the record, discloses, that the plaintiff offered evidence, tending to prove, that Wilson was an owner of the steamboat, prior to the date of the due bill, and the defendant, Wilson, having offered no evidence, except such as tended to show he was not a joint owner of the boat, the court charged the jury, that defendants being sued on a due bill, expressly made the foundation of the action,

without a plea, denying under oath the instrument declared on, it is evidence of the debt it expresses. And if there was sufficient proof, that Wilson was part owner, at the time the due bill was given, this, with the due bill, will bind him upon the pleadings.

The court having overruled the admissibility of the due bill as evidence, under the declaration, the defendant moved the court to charge, that although Wilson may have received a written transfer, of a former part owner's interest in the boat, yet if he was not concerned in navigating her, and assumed to exercise none of the rights of an owner, the mere possession of the title, would not make him liable in this action. 2. That the jury were not to regard the date of the due bill, as conclusive evidence, that the work was done at the time it bears date, or that Wilson was owner at that time.

These charges the court refused to give, but qualified the second charge, by saying, that if the due bill bore date during the joint ownership of Wilson, it was in the absence of other proof on the point, conclusive on him. This was excepted to, and these matters are now assigned as error.

PHILLIPS, for plaintiff in error.

By the third section of the bankrupt law, all rights of property of every nature are by the decree, *ipso facto*, by mere operation of law, deemed to be divested out of the bankrupt, and the same shall be vested by force of the decree in the assignee. The demurrer to the plea of bankruptcy therefore admits that the plaintiff was incompetent to prosecute the suit.

The note offered was variant from the allegation, and was not evidence under the special count, as matters of description are matters of substance when they go to the identity of the instrument. [1 Greenleaf Ev. 65, and authorities there cited.]

It was not necessary to deny the execution of the instrument by plea of *non est factum* under the statute, for the note is not signed by the defendant, nor by any one for him.

Nor does the declaration set forth any execution by a competent authority, as one joint owner of a boat has no autho-

city to bind the other part owners by such an instrument. [Story on Part. 420, 426.]

The possession of the title by defendant did not make him liable for the contracts of the boat. [Jones v. Pitcher, 3 S. & P. 169; Leonard v. Huntington, 15 Johns. 298; Reynolds v. Toppan, 15 Mass. 372; Thorn v. Hicks, 7 Cowen, 698; Cutler v. Winson, 6 Pick. 339.]

T. A. HAMILTON, contra.

The case of plaintiff's bankruptcy, after commencement of suit, is analogous to the death of the party, and in the absence of any other rule, the statute of this State allowing the personal representative to make himself a party, might be considered as the rule to govern.

An assignee of bankrupt is allowed to sue out a writ of error to reverse a judgment rendered against the bankrupt. [Day v. Laffin, 6 Metc. 280.]

The plea in this case is a mere plea of bankruptcy of the plaintiff, and the suggestion of the bankruptcy upon the record, and the making the assignee a party, may be regarded as a mere admission of the suggestion of the plea making the proper party, which is authorized by the law of Congress.

Plea of bankruptcy properly demurred to because it appeared upon an inspection of the record that the defect was cured. When action was commenced in the name of the bankrupt, before the act of bankruptcy, the assignees may proceed, and if the court can see upon the whole record that the assignees are entitled to recover, they will use their utmost sagacity to give them judgment. [Hewitt v. Mantell, 2 Wilson, 374.]

The conclusion of the plea of bankruptcy, viz., that there is no person before the court authorized to conduct the suit, is a mere inference from the former part of the plea, and so regarded by the counsel for the plaintiff in error in his argument.

The defendant's plea may perhaps be properly regarded as a plea in abatement, and seems, in argument, to be so considered by plaintiff's counsel. If that be the case, then it should have been verified by affidavit, and is bad for the want of it.

Pleas, *puis darrein continuance*, are required to express every thing with extreme certainty; which was scarcely done in this case. [Vicary v. Moore, 2 Watts, 451.]

There was no variance between the first count in the declaration and the due bill offered in evidence. It was substantially described, and that is sufficient. [Greenleaf on E. 65, note.] Besides, the point was not raised in the court below, as shown by the bill of exceptions.

When a plea denies that a writing declared on is the defendant's act in law, or in other words, insists that it was not intended to impose a legal obligation or duty upon him, it must be verified by affidavit. [Lazarus, use, &c. v. Shearer, 2 Ala. Rep. 726; Sorrelle v. Elmes, 6 Ala. 706.]

The first charge asked by the defendant, was properly refused—there being no evidence to warrant it; also, because the charges given covered all the ground.

The second charge asked by defendant, was properly refused, or rather qualified by the court, under the facts as shown in the bill of exceptions.

The first charge given by the court, as to the effect of the due bill, and proof of Wilson's ownership, under the pleadings at bar, was correct, and covered the whole case, and rendered the other charges unnecessary, and inapplicable.

When stores were supplied to a ship, on the order of one of several owners, who acted as ship's husband, and took his note in payment, and gave a receipt in full, held, that all the owners were liable, the note not being paid. [7 Johns. 311.]

The owner of a vessel, as well as master, is liable for repairs done to it. [16 Johns. Rep. 89.]

The cases cited by the counsel for the plaintiff in error, will not sustain the idea that the owners of a boat are not liable for the repairs. Besides, they are inapplicable to the case before the court. [See cases cited by him—also, 4 Pick. 458; Perry v. Osborn, 5 Ib. 422; Higgins v. Pickard, 2 Hall, 226.]

ORMOND, J.—The bankruptcy of the plaintiff, certainly disabled him from the further prosecution of the suit, and made it necessary, either that it should be dismissed, or pro-

secuted in the name of the assignee in bankruptcy. The plea of the defendant, alledging the bankruptcy of the plaintiff, was certainly proper, but the suggestion of the same fact, by the plaintiff's counsel, was in effect, an admission of the truth of the plea, and rendered it inoperative, as it had performed its office. The substitution of Mr. Harris, the assignee, as plaintiff, on motion of counsel, must be understood to be with his consent, and if it was unauthorized, the counsel would be liable for the consequences of his act.

The due bill upon which the action is founded, was not executed by the defendant, Wilson, in person, and to bring it within the influence of the statute, making the instrument sued on, evidence of the debt, or duty, for which it was given, unless its execution is denied by a sworn plea, it must be alledged in the declaration, to have been executed by one, having authority to bind him. This is supposed to be the effect of the allegation here, but in our opinion no such effect can be accorded to it. It deduces the right of Brooks, to bind Wilson, from the fact that Wilson is a part owner with Brooks of the steam boat. The language of the declaration, is, that the due bill was made by Brooks, acting for himself, and as joint owner with Wilson, of the boat. But one part owner has not the power to charge another, by contracting debts in his name, and there is no allegation, that Brooks had authority, as agent of Wilson, to bind him by the execution of a note in his name. In *Childress v. Miller*, 4 Ala. Rep. 447, an attempt was made to charge the owners of a steamboat, on a due bill made by the clerk of the boat, "for steamboat Choctaw, and owners." It was held that these words, did not in themselves, import an authority to bind the owners, and that as the clerk of the boat as such, had not the right to admit an indebtedness on the part of the owners, the action could not be maintained. This is a decision expressly in point, as the statute applies only to such instruments, as are the foundation of the action; and this not being signed by the party sought to be charged, could only be obligatory on him, by being executed in his name, by one duly authorized to bind him.

The first motion of the defendant for a charge to the jury, was not authorized by the evidence in the record, it is therefore unnecessary to decide how far, or to what extent a part

owner, not engaged, or concerned in running, or navigating the boat, would be liable to the workman, for work and labor done upon the boat, not authorized by him.

Let the judgment be reversed, and the cause remanded.

SHEPPARD v. MELLOY, ET AL.

1. It is not indispensable to the regularity of an execution, issued on a forthcoming bond, that it should affirm on its face, that the bond was forfeited.
2. A discrepancy between the first, and second executions, as to the amount of costs, furnishes no ground for quashing the latter.
3. A difference in the amount of damages, which a first, and second execution, affirm the plaintiff recovered, is such a clerical misprision, as may be amended in the primary court; and when the record, which shows the variance, and upon which the motion to quash is founded, furnishes the only proper *data* for the correction of the error, it is the duty of the court, *mero motu*, to direct the amendment, and overrule the motion to quash.
4. An execution may include defendants to the judgment, who did not unite in a forthcoming bond, as well as the obligors in the bond, if forfeited. If the execution does not on its face, or by the indorsement of the clerk, show, who were the obligors in the bond, it may be amended by the judgment and forthcoming bond.
5. One of several defendants may replevy property levied on, although his co-defendants do not unite with him in the bond. Whether after a forfeiture, the other defendants could replevy, when their property was levied on, upon an execution on the forfeited bond, *Quere*.

Writ of Error to the Circuit Court of Covington.

A writ of *fieri facias* was issued against the goods and chattels, &c. of Thomas Loyd and Josiah Jones, requiring to be made the sum of three hundred and seventy-seven dollars damages, and fifteen dollars and 18 3-4 cents costs, which the plaintiff in error had recovered against them. This *fi. fa.* was levied by the sheriff of Covington, on a negro boy as the property of Loyd; thereupon Loyd executed a forthcoming bond, with Melloy as his surety. The condition of

this bond recites the *fi. fa.*, as directing to be made the sum of three hundred and seventy-seven dollars, principal, with interest and costs, that it was levied, &c. It is then stipulated by the obligors, that if the principal shall well and truly deliver the slave levied on to the sheriff of, &c., by. &c., or pay and satisfy the debt, and costs, due on the *fi. fa.*, the obligation shall be void.

The sheriff returned this bond forfeited, and thereupon a *fieri facias* was issued against both the defendants in the judgment, and the surety in the bond, requiring to be made the sum of three hundred and seventy-seven dollars and 87 3-4 cents, the amount of damages recovered by the plaintiff, and also nineteen dollars 12 1-2 cents, the costs of suit, &c. This *fi. fa* was levied on cattle as the property of Melloy, and certain real estate as the property of Josiah Jones.

Melloy presented his petition to the judge of the circuit court, in which, after setting forth the foregoing facts, it is stated, that the *fi. fa.* as to Jones, had been superseded by the order of a judge, yet the plaintiff in execution was enforcing it against the petitioner, and alledging the following causes why it should be superseded, viz: 1. The bond is defective as a statute obligation, and no execution can issue thereon. 2. That the last execution is defective, and is not supported by such a judgment as it described. 3. That it should show the forthcoming bond had been forfeited—that is, so returned. 4. Petitioner is merely a surety for Loyd, was himself a co-surety with Jones for one Fleming; he should only be chargeable with one-half of the amount of the execution; consequently the *supersedeas* granted to Jones should suspend the operation as to a moiety of the sum required to be made.

A *supersedeas* was granted, arresting the action of the execution *in toto*; and afterwards, on motion, the execution was quashed, for the reasons as stated in the judgment entry, that the forthcoming bond did not conform to the statute, and there was no such judgment as is described in the execution; and thereupon a judgment was rendered against the plaintiff for costs.

E. W. PECK, for the plaintiff in error, insisted that the

bond substantially conformed to the statute, and this was sufficient. [Anderson v. Rhea, 7 Ala. Rep. 104.]

T. H. WATTS, for the defendant in error, made the following points. 1. The execution was defective, because it was not supported by such a judgment as it described. 2. The bond is so indefinite, that it does not identify the execution : it does not state who was the plaintiff in execution, and is in other respects uncertain. [Lunsford, et al. v. Richardson & O'Neal, 5 Ala. Rep. 618 ; Rhea v. Anderson, 7 Ala. Rep. 104.] 3. The execution should not have issued against all the parties to the original judgment, unless they had all joined in making the bond. [Clay's Dig. 215, § 71, 73 ; Land v. Hopkins, 4 Ala. Rep. 427.]

COLLIER, C. J.—We will consider this case upon the hypothesis, that the objections to the execution, as stated in the petition for a *supersedeas*, are all supported by the record. The forthcoming bond is certainly not drawn with technical accuracy, but it contains all the substantial requisites of the law. It describes the execution by the parties to it, the amount required to be made, the court from which it issued, the property levied on, and stipulates for its delivery to the sheriff on the next regular sale day, at the hour of twelve o'clock. The property of but one of the defendants in the *fi. fa.* was levied on, and the bond only executed by him and a surety. In all this there is no irregularity. The execution is sufficiently identified by the description of it in the bond, and it is certainly the right of one of several defendants whose property is seized under a *fi. fa.* to replevy it, although his codefendant does not unite with him in executing a bond. [Clay's Dig. 215, § 71.]

It is not indispensable to the regularity of an execution issued on a forthcoming bond, that it should affirm on its face that the bond was forfeited, though to have authorized it to issue, the proper officer should have made such a return. [Clay's Dig. 215, § 73.]

The execution in question differs from that under which the bond was taken, both in the amount of damages and costs which it requires to be made ; the former states the re-

covery of the plaintiff to be \$377 87 3-4 damages, and \$19 12 1-2 costs; while the latter states the damages to be \$377 damages, and \$15 18 3-4 costs. As it respects the costs, the discrepancy between the first and second executions furnishes no ground for quashing the latter. We know that according to our practice, the judgment is not rendered for any definite sum as costs, but merely that the successful party recover of the other his costs, which are afterwards to be taxed by the clerk of the court; and upon this taxation the execution issues. This being the case, where successive executions issue upon the same judgment, the last must of course require the collection of a larger amount of costs than the first—these are increased according to the magnitude of the debt or damages required to be made, or the service performed by him to whom the execution was entrusted. So that the judgment in respect to the amount of the costs is not fixed, but changes with each renewal of the execution—opening to receive the addition. If the execution requires more costs to be collected than the defendant is liable to pay, it is not for that cause voidable in other respects. It has accordingly been held, and may be considered the settled law in this State, that when too much costs be taxed on an execution, it will not be quashed, but they will be retaxed on motion. [2 Stew. R. 228; Walton v. Brashears, 4 Bibb's R. 18.]

In regard to the difference in the amount of the damages which the first and second *fi. fa.* affirm the plaintiff recovered, we think it is such a clerical misprision as may be amended by the primary court. Cawthorn v. Knight, at the last term, is an authority in point, and perhaps goes quite beyond what the present case requires us to decide. There the name of an individual was inserted as a defendant in the execution, who was not a party to the decree of the orphans' court on which it issued. Without considering whether the case was embraced by the statutes of amendment, we thought the cases cited furnished an ample warrant for striking out the name of the improper party; that the powers of courts over their process, independent of legislation, are sufficiently expansive to embrace such an authority: especially where the record contained the *data* by which to amend. In the opinion pronounced, we cite many decisions which support

not only the conclusion, but the reasoning employed by us. Among other things, it was said: "The amount of the judgment stated in the execution may be amended. [2 T. Rep. 737; 5 Johns. Rep. 100.] A misnomer on a *ca. sa.* has been amended after it has been executed, (Barnes' Notes, 10; 4 Taunt. Rep. 322); and even one of the names of the plaintiffs has been stricken out. [2 T. Rep. 737.] And an amendment has been allowed so as to make the amount agree with the judgment where it is variant. [1 Chitty's Rep. 349.]" In *Johnston v. Lynch and Adair*, 3 Bibb's Rep. 334, the sheriff was required to make upon a *feri facias*, a larger amount of some of the defendants than they were liable to pay; and the question was, whether the irregularity was amendable, or entirely vitiated the execution. The court said, it was true that according to the strict ancient rules of the common law, errors in the process were not amendable; but by various statutes and adjudications of more modern date, the rule is now incontrovertibly settled, that errors, occasioned by clerical misprisions, where there exists any thing in the record to amend by, will be amended. And this will be done whether the error exists in the proceedings before or after judgment. It was added, that the error in the excess complained of in the execution was a clerical misprision, and that there was enough shown in the record by which the amendment could be made. See also, *Kentucky Ins. Co. v. Sanders*, 4 Bibb's Rep. 471; *Jackson v. Pratt*, 10 Johns. Rep. 392; Printed Dec. (Ky.) 170, 173, 175, 208, 218, 249; *Bissell v. Kip*, 3 Johns. Rep. 89 to 100, and cases there cited, both in the opinion of the court and in the argument at the bar; *McKonker v. Glen*, 1 Cow. Rep. 141; *Inman v. Griswold*, Id. 199; *Jackson v. Walker*, 4 Wend. Rep. 462, *Jackson v. Anderson*, Id. 474; *Borland v. Stewart*, Id. 568; *Porter v. Goodman*, Id. 413. We need not add to these citations; for what was said in *Cawthorn v. Knight*, *supra*, sufficiently indicates our opinion that an amendment would be allowable in the present case, so as to make the execution conform in the amount of damages to the judgment described in the forthcoming bond.

We cannot think it was necessary for the plaintiff in execution to have submitted a distinct motion to the court for

leave to amend the *fi. fa.* If the authority to allow the amendment appeared by extrinsic proof, then the motion should have been made, and the proof adduced. But when the record which shows the variance, and upon which the motion to quash was founded, furnished the only proper *data* for the correction of the error, it was the duty of the court *mero motu*, to have directed the amendment of the execution, and overruled the motion to quash.

In *Hopkins v. Land*, 4 Ala. Rep. 427, it was held, that a "forthcoming bond was not an extinguishment of the judgment; and that the plaintiff, at his election, may sue out an execution on it, or have his execution against the sureties to the bond, as well as against all the defendants." We can perceive no objection in embracing the defendants to the judgment, and the obligors in the bond, in the same execution, although all the defendants did not unite in executing the delivery bond; especially where, as in this case, the execution indicates upon its face, or the indorsement of the clerk, who were the obligors in the bond. And, even if the execution did not show in what character the defendants were bound to satisfy it, we are inclined to think, it would not be a fatal objection to it upon a motion to quash; but if material, it should be amended by the judgment and forthcoming bond. Whether it would be competent for one of several defendants, after the forfeiture by his co-defendant of a bond in which he did not unite, when his property was levied on under a *fi. fa.* embracing all the defendants in the original judgment, and obligors in the delivery bond, to replevy the same upon executing the statute bond, is a question upon which we express no opinion.

The judgment quashing the execution, affirms nothing in respect to a *supersedeas* having been previously granted at the instance of Jones; we cannot therefore assume that the fact was proved. But if it were, does it necessarily follow that the execution is voidable even as to him; and if it be so, as the plaintiff might have sued out execution against Loyd and Melloy alone, the obligors in the forthcoming bond, the name of Jones might be stricken out, and it would be good as to them. Although Jones and Loyd may have been

the sureties of Fleming, for the debt on which the judgment is rendered, as between themselves and the plaintiff, they are each liable to pay it *in toto*.

We have noticed each of the points made by the defendant in favor of the decision of the court below, and our conclusion is, that the judgment must be reversed, and the *supersedeas* dismissed.

POSEY v. HAIR.

1. A declaration averring that the defendant undertook to collect a *certain debt*, without showing for what sum, is bad on demurrer.

Writ of Error to the County Court of Sumter.

ASSUMPSIT by Posey, suing by *prochien ami*, against Hair. The declaration consists of four counts, the three first of which were overruled, on demurrer, and a verdict for the defendant on the other. The overruled counts are very similar, and one only need be stated, as the same ground for exception exists in all. The cause of action in that is thus stated: For that, &c., on, &c., at, &c., the said defendant, in consideration that the said plaintiff, at the special instance and request of the said defendant, had authorized and empowered the said defendant to settle the amount of a certain debt then due and owing from P. H. Anderson and Lewis Parant, to P. M. Posey, to and for the use of the said plaintiff, and to obtain payment and satisfaction of the said debt from the said Anderson and Parant, he the said defendant undertook, and then and there faithfully promised the said plaintiff, to render an account to the said plaintiff of all monies and securities which he, the said defendant should re-

ceive, for and on account of said debt, and to pay and deliver all such monies, and securities for monies, which the said defendant should receive, for and on account of said debt, and to pay and deliver all such to the plaintiff, when he, the defendant, should be thereunto afterwards requested. Breach, that the said defendant appropriated the said debt to his own use, whereby it became of no use to the plaintiff, and which said debt is wholly unpaid to the said plaintiff, and by reason whereof the said plaintiff is likely to lose the same.

It is now assigned as error, that the court overruled these counts.

HUNTINGTON, for the plaintiff in error, cited *Swansey v. Breck*, 10 Ib. 533.]

HORT, contra, insisted, the counts were defective, as no sum or value is stated, and there is nothing from which it can be inferred an action has arisen. [1 Chit. Pl. 271; Ib. 331; *Ward v. Harris*, 2 B. & P. 266; *Andrews v. Whitehead*, 13 East, 115; *Barton v. Webb*, 8 Term, 459.]

GOLDTHWAITE, J.—The certainty which is required in a declaration, or plea, is such a statement of the facts constituting the cause of action, or ground of defence, as will enable them to be understood by the party who is to answer them, the jury who are to ascertain their truth, and by the court which is to give the judgment. [Chit. Pl. 212.] Nor will the introduction of the words *certain debt*, or *certain sum*, be of any avail, if the debt or sum is not otherwise sufficiently stated. [Ib. 216.] The counts overruled are clearly deficient in this kind of certainty, and therefore the demurrer was properly sustained.

Judgment affirmed.

MERRILL v. SMITH.

1. S. having obtained several judgments against W. M. and J. M., transferred them to J. M., authorizing him to "use said notes and judgments, at his own charge and risk, and it is agreed that I am to pay no costs that has, or may accrue." Held, first, that this was not a contract to pay the debt, or answer for the default of another, within the statute of frauds. Second, that J. M. was bound to see that no use was made of the judgments prejudicial to S., and as he could not himself prosecute a writ of error to reverse the judgments, neither could he defend himself upon the ground, that he did not consent to the prosecution of such a writ by his co-defendant, as the agreement was in legal effect a covenant against such an act.
2. The fact, that J. M., before entering into the contract, was advised by a lawyer, that it would not subject him to the costs of the judgment, S. was not admissible evidence.

Error to the Circuit Court of Butler.

ASSUMPSIT by the defendant in error, to recover the amount of certain costs, which the plaintiff had been compelled to pay, under the following circumstances: The plaintiff had obtained several judgments against the defendant, and one William Merrill, before a justice of the peace, which he transferred to the defendant, by the following instrument: "For value received, I, John Smyth, do hereby transfer to Jacob Merrill, all my right, title and interest, in, and to eight promissory notes, dated 14th September, 1840, for forty-five dollars each, due one day after date thereof, as well as the judgments thereon. Said notes having been made by William Merrill, and Jacob Merrill. Said Jacob Merrill is hereby authorized to use said notes, and judgments, at his own charge, and risk, and it is agreed that I am to pay no cost that has accrued, or that may accrue thereon. One of the said notes having a credit of five dollars—this 6th September, 1843."

(Signed,)

JOHN SMYTH.

This writing was produced by the defendant, upon a notice to him, and was delivered to him at the time of its execution. It was also in proof, that the judgments recited in the transfer, were brought to the supreme court by writs of error, in the name of Willian and Jacob Merrill, from the county court, where they had been carried by *certiorari*, and by this court reversed, but the name of Jacob Merrill, the defendant, did not appear on the writ of error bond.

The defendant objected to the introduction of the writing, because not signed by him, but the court overruled the objection.

The plaintiff then proved, that at the time the writing was executed, the defendant proposed to the plaintiff, to pay him the amount due on the judgments, if he would take Alabama money, then at a discount of eleven per cent. This was agreed to, and the defendant, who was a security for his brother William, executed his note for the payment of the money, which, by the agreement, was to be discharged with "Alabama money," and was paid shortly after.

To the introduction of this testimony the defendant objected, but the court overruled the objection.

The defendant then introduced a note, for the payment by the defendant, to the plaintiff, of \$446 40, dated 6th Sept. 1843, and proved that it was the same note referred to by the testimony, and moved to exclude all parol evidence respecting its terms, but the court refused to withdraw the evidence from the jury.

The defendant also offered to prove, that previous to the purchase of the judgments, he had been advised by a lawyer that if he settled the judgments, he would not be liable for any costs, which was offered in connection with the fact, that he was an illiterate man, as a circumstance to show he had not assumed, or promised to be liable for any costs. This was objected to, and the objection sustained by the court.

The evidence tended to show, that the writs of error were prosecuted by William, and not by Jacob Merrill, and that he knew nothing of it, until the writs of error were sued out, and upon the testimony, the defendant moved the court to charge the jury, that if William Merrill prosecuted the writs

of error, without the knowledge or consent of the defendant, that he was not bound, under the contract with the plaintiff, to pay the costs accruing upon the writs of error, although plaintiff had thereby been mulct in costs, and had paid the same. This charge the court refused, and charged in legal effect, the converse of the proposition. Several other charges were moved for, involving the same legal propositions, and refused by the court, to all which the defendant excepted, and which, together with the matters of law arising out of the bill of exceptions, and the overruling the demurrer to the declaration, are now assigned as error.

WATTS, for plaintiff in error.

1. The demurrers should have been sustained. There is no sufficient consideration stated to support the promise.

2. The facts stated in the declaration show an attempt to convert a record debt into a simple contract, which cannot be done.

3. If it should be considered that the agreement to receive Alabama money was a sufficient consideration to support the promise, it should have been averred in the declaration, that the Alabama money was worth less than gold or silver, and how much. Without this averment, the court, on demurrer, will presume it to be at a par value.

4. The testimony of Leslie, adding to and varying the written contract, ought to have been excluded. [See *Pay-sant v. Ware*, 1 Ala. 158, and authorities there cited; see also *Hair v. La Brouse*, 10 Ala. 548; *Mead v. Steger*, 5 Port. 498; 2 Ala. 280; 5 Ib. 521.]

5. Jacob Merrill, was not bound by the transfer, to protect Smyth against the acts of William Merrill. According to the terms of said contract, he does not warrant against the acts of any person except himself.

6. If it should be considered that the terms of the transfer are sufficiently broad to cover the acts of William Merrill, Jacob Merrill would not be bound thereby, because said instrument is not signed by him.

7. The fact offered to be proven by the lawyer, should have been admitted. It attempted to lay a foundation for

the explanation of the written contract. [See *Paysant v. Ware*, *supra*.]

Cook, contra. A writing to pay a sum of money "in the common currency of Alabama," is not an undertaking to pay the sum expressed in coin, but in bank notes—will not sustain a declaration for a sum certain, and unassisted by other proof, will not sustain a recovery upon the common counts. [*Carlisle v. Davis*, 7 Ala. Rep. 42; *Young v. Scott*, 5 Ala. Rep. 475.]

An agreement being made without consideration, yet if it be executed, no objection can be made on that ground. [*Robertson v. Gardner*, 11 Pickering, 150; *Bener v. Butler*, *Wright*, 367.]

Forbearance to sue, is a sufficient consideration for a promise to pay the debt of another. [4 J. R. 237.] A gratuitous promise, if the performance be entered upon is binding. [2 J. Cases, 92.] A benefit to one, or trouble to another, is a sufficient consideration. [4 Marsh. 538; 4 Monroe, 532.] Assignment itself is sufficient consideration—so also is the compromise of the suits.

A party may prove a consideration different from the written statement. [2 Marsh, 596; 3 Marsh. 473.] That the party may show the consideration, and parts of the contract not reduced to writing. [3 Ph. Ev. C. & H's. Notes, 1472, 1473, 1474, 1475, 1479.]

ORMOND, J.—The question arising under the demurrer to the special counts of the declaration, and those arising under the decision of the court upon the legal effect of the contract, are in effect the same, and will be considered together.

The statute of frauds has nothing to do with the question here presented. The contract between the plaintiff and defendant, is in effect a purchase by the latter, from the former, of certain judgments against him, and William Merrill, he stipulating for the right to use the judgments in any manner he might think proper, and guaranteeing the plaintiff, against all costs which had then, or might thereafter accrue. This guaranty against the costs, was not a promise to pay the

debt of another, but was a promise to pay his own debt, and for which he was individually responsible, so far as costs had then accrued. So far as costs might accrue in future, it was in effect a covenant against the acts, both of himself and his co-defendant, the consideration of which was, the transfer of the judgments to him, with the right to use the name of the plaintiff, to reimburse himself, by the aid of the judgments then existing, the money he had paid as the surety of his brother. A promise to indemnify against the act of another, is in no just sense a promise to pay, or "answer for the debt, default, or miscarriage of another person," and is not within the letter, or spirit of the statute of frauds.

To bring a case within this clause of the statute, there must be a debt, or default of another, against the failure, or omission to perform which, the promissor stipulates. Thus where an action had been brought by A. against B. for an assault, and C. promised A. that if he would withdraw the record, he would pay him a sum of money, this was held not to be within the statute. [Read v. Nash, 1 Wilson, 305; see also, Stephens v. Squires, 5 Mod. 205; Harris v. Hinchback, 1 Burr. 372.]

So here, the promise was not to answer for any thing which William Merrill was bound to do, or perform, but it was an indemnity against future costs, on the judgments which it was supposed might accrue, in the attempt on the part of Jacob, to enforce them against William Merrill. It was in truth, a promise to answer for the consequence of his own acts; for as he had by the transfer of the judgments acquired a right to control them, and had stipulated to be responsible to the plaintiff for all future costs, he was bound to see that no use was made of the judgments prejudicial to the plaintiff. He certainly could not himself prosecute a writ of error to reverse the judgment he had thus purchased, and charge the plaintiff with the costs, neither can he defend himself upon the ground, that he did not consent to the prosecution of such writ by his co-defendant; for, as already stated, the agreement is in legal effect a covenant on his part against such an act. This results necessarily from the transfer of the judgments to him, which deprived the plaintiff of all power of controlling them, and the promise of the defendant to pay

the costs which had then, or might thereafter accrue. By this, he became by substitution owner of the judgments, in the place of the plaintiff, and responsible in future, as the plaintiff would have been, if the transfer had not been made.

It is very clear, that the written evidence of the transfer was competent testimony, of the terms upon which the transfer was made; being delivered to the defendant, as the evidence of the title to the judgments, and received by him, it is in the nature of an admission by him, that the stipulations there recited had been agreed to by him. It was testimony of the same grade as the parol evidence offered, of the terms of the contract.

There was no objection to the proof, that the consideration was the payment by the defendant, of the amount of the judgment, in "Alabama money," by which we understand, the bank notes of the State Bank and its branches. Nor was this varied by the production of the note then executed for the payment of the amount promised, without specifying the medium in which it might be discharged. It is certainly true, that if suit had been brought upon the note by the plaintiff, the defendant could not have averred against it, that there was an agreement to receive bank notes, at par value, in payment. But that is not the question here. It is what was the consideration of the transfer, and what was actually received. Considered in this aspect, the note is in the nature of a receipt, and having performed its functions, and been discharged according to the true contract of the parties, it cannot have the effect of an estoppel, precluding the parties from showing the truth of the case. But we are unable to perceive the importance, or necessity for this proof. The transfer of the judgments was a sufficient consideration for the promise to indemnify the plaintiff against the costs, whether the amount due on the judgments was paid in depreciated bank notes, or in gold and silver.

The legal effect of the contract between the plaintiff and defendant, could not be varied by the proof, that the defendant, before entering into it, was advised by a lawyer, that it would not subject him to the payment of the costs of the

judgments. This does not prove a mistake of fact, if such testimony were admissible in a court of law, to vary the terms of a contract; but if it amounts to any thing, is an attempt to vary, or alter its legal effect, by proof that the defendant was mistaken as to its legal effect. Considered in this aspect, it is clear it was properly rejected.

We do not perceive any error in the record. Let the judgment be affirmed.

SAWYER v. HILL, USE, &c.

1. An agreement entered into without consideration, by the maker of a note, with one who at the time is the owner of the note, to exchange it for other notes, then held by the maker against him, cannot be enforced against a subsequent plaintiff, for whose use suit is brought on the note.

Error to the Circuit Court of Shelby.

THIS was an action of assumpsit, at the suit of the defendant in error. The cause was tried on the general issue, with leave to give any special matter in evidence; a verdict was returned for the plaintiff below, and judgment was rendered thereon. From a bill of exceptions, sealed at the defendant's instance, it appears that proof was offered by him, tending to show, that before the note declared on became the property of the beneficial plaintiff, it was transferred by Hill, the payee, to one Thomas; that while the note belonged to Thomas, the latter agreed with the defendant that he would take two small notes, which defendant held on him, equal in value to to the note sued on, in payment or satisfaction of the same; that defendant was to deliver the two notes to one Hinkle, to whom Thomas was also to deliver the note of which he was the proprietor, and thus make the exchange of paper.

Hinkle was apprised of this agreement, and was the agent of the defendant, to settle the business ; he delivered to Thomas one of the small notes, in liquidation of a book account he had against the defendant, and Thomas refused to take the other small note in any part satisfaction of the note sued on.

There was no evidence that the beneficial plaintiff had notice of the facts proved, when he becamd the proprietor of the note. The defendant's counsel recapitulated the evidence, and prayed the court to charge the jury, that if they believed it to be true, they should find for the defendant. This charge was refused, and the jury were instructed that if they found there was such an agreement, they should allow the defendant the amount of the small note taken by Thomas, but not that which he refused.

T. D. CLARKE, for the plaintiff in error.

B. T. POPE, for the defendant in error, insisted, that neither Hill or Brashear could be affected by any agreement between the defendant and Thomas, which was not executed ; especially, if it was not shown that they had notice of it. Even if the contract had been executed by the defendant, yet if he suffered the note to remain in Thomas's hands, and thus enabled him to pass it off, he would be liable to the plaintiff. There is no *mutuality* or *privity* between the nominal or real plaintiff, and the defendant's claim against Thomas. (3 Stewt. & Port. Rep. 35 ; 1 Id. 19 ; 7 Porter's Rep. 543 ; 7 Ala. Rep. 494 ; 8 Id. 896 ; 9 Id. 633.] If the note had been indorsed to Thomas, still the contract between him and the defendant would be inoperative, because it was not supported by a new consideration. (1 Ala. Rep. 43.)

COLLIER, C. J.—In *Stocking v. Toulmin*, 3 Stew. & P. 35, it was held that the statute which declares that promissory notes may be assigned by indorsement, and that the maker shall be allowed the benefit of all payments, sets off and discounts, had, made or possessed previous to notice of the assignment, in the same manner as if the same had been sued by the payee therein, did not give the right to set off against

a subsequent indorsee, a debt due from an intermediate assignee. And in *Kennedy v. Manship*, 1 Ala. Rep. 43, it was decided that a set-off by the maker of a promissory note, against an intermediate indorser, cannot be allowed, unless there is a contract between the parties to admit it, founded on some new consideration. The court said, a mere willingness to set off one demand against another, or even an express understanding so to do, without some new consideration to support it as a contract, cannot have the effect to defeat the right of the plaintiff to recover. If such an understanding existed between the parties, why was the execution of it deferred, or why should an innocent holder be made to suffer by the *laches* of him who has neglected to protect his own interest. These cases establish that no equity arises under the act of 1812, to let in as a defence a demand due by an intermediate holder to the maker. So a set-off due to the maker of a note by one who has become beneficially interested in it, without the legal title by indorsement, cannot be enforced, so as to defeat the right of a subsequent indorsee to recover on the note. [*Pitts v. Shortridge's Adm'r*, 7 Ala. R. 494. See also *Sheffield & Co. v. Parmlee*, 8 Id. 889; *Smith v. Taylor*, 9 Id. 633; *Robinson v. Breedlove*, 7 Porter's R. 543.]

The case at bar is not distinguishable in principle from those cited. If the indorsement of a note by one who was its proprietor, without being its assignee in the mode contemplated by the statute, could free it from the right of the maker to avail himself of a set-off against the person thus indorsing it, we can perceive of no reason why, upon the return of the note to the payee, or its transfer by delivery merely, the same consequence should not follow. A note in the ordinary form, does not, when indorsed, become subject to the law merchant, and the indorsement by one who was its proprietor by delivery would not make out a continuous chain, constituting the indorsee the legal holder from the payee. So that, whether such proprietor deduced a title by indorsement or otherwise, the effect would be the same.

The fact that Thomas agreed to receive of the defendant

the two small notes in satisfaction of that declared on, cannot vary the case. This agreement was not founded on any new consideration, and according to *Kennedy v. Manship*, *supra*, can have no influence against the plaintiff. The ruling of the circuit court was not prejudicial to the defendant below, and its judgment is therefore affirmed.

MASON & CHAMBERS v. MOORE & TULANE.

1. A *certiorari* to review the judgment of a justice of the peace cannot be regularly sued out after the expiration of three years from the rendition of the judgment; and if sued out after that time, is properly dismissed.

Writ of Error to the Circuit Court of Shelby.

MASON, one of the plaintiffs in error, in March, 1846, petitioned the judge of the county court for *certiorari* and *superseatas* to remove to the circuit court a judgment obtained by Moore & Tulane, for the use of Moore, against him, before a justice of the peace. The petition does not state when this judgment was given. The alledged ground for the *certiorari* is, "that the judgment has long since been paid." The *certiorari*, &c. was allowed and returned to the circuit court.

From the return of the magistrate it appears judgment was given by him the 5th September, 1840.

At the first term after the return of the *certiorari* to the circuit court, it was continued for plaintiff.

At the next term, the parties appeared, and the plaintiff moved to dismiss the writ of *certiorari*, which motion was allowed, the writ dismissed, and judgment given against Mason, and against the other plaintiff in error, for the costs of suit.

This dismissal is now assigned as error.

POPE, for the plaintiffs in error, insisted, it was too late to dismiss after the first term.

PECK, for the defendant in error, contended—

1. That as no sufficient ground is laid in the petition to revise the judgment, and as the ground there assumed is one for which a *certiorari* will not lie, the motion to dismiss was proper at any time.

2. That no *certiorari*, or other proceedings in the nature of a writ of error, will lie after three years from the time of rendering the judgment.

GOLDTHWAITE, J.—Without stopping to inquire, whether the return of this *certiorari* to the circuit court, at the *fiat* of the county judge, or the relation in the petition that the judgment has long since been paid, are sufficient to distinguish this case from that of *Alford v. Colson*, 8 Ala. Rep. 550, where the rule is laid down, that motions to dismiss writs of *certiorari* must be made at the first term after appearance, we held the opinion, that here it was properly dismissed on account of the lapse of time. Previous decisions of this court show, that *certiorari* is not the proper writ to revise errors or irregularities accruing after judgment. [*Bobo v. Thompson*, 3 S. & P. 385; *Wheelock v. Wright*, 4 Ib. 103; *Gray v. Dennis*, 3 Ala. R. 717; *Gilliland v. Ware*, 4 Ib. 414.] But hitherto, no decision has been made as to the time within which a *certiorari* to examine the merits of the cause must be applied for. There is no statute prescribing a limitation for such re-examination, but writs of error from the county to the circuit, and from the circuit to the supreme court, are prohibited after the expiration of three years from the rendition of the judgment. [Dig. 309, § 17.] Courts of equity will not allow bills of review to be filed after the expiration of the period to which writs of error are limited, and we have held the statute as extending to writs of error *coram vobis*. [*Richardson v. Williams*, 5 Porter, 515.] It seems

equally reasonable to extend it to writs of *certiorari*, which, in relation to judgments of justices, operate as writs of error *coram vobis*, by allowing the re-examination of the cause upon its merits. In this case, it is shown by the return of the justice, that the judgment was given in September, 1840. The application to review it, is not made until March, 1846. We are clear, that after three years, no judgment of a justice can be revised by *certiorari*. There was therefore no error in dismissing the writ.

Judgment affirmed.

ALDERSON v. HARRIS & MERRILL.

1. It is no ground for the rescission of a contract for the sale of land, that one who sold the land as agent, had no authority to act, if the principal ratifies his act, and is able, and willing to make title.
2. Where one falsely, and fraudulently, represents himself as an agent, authorized to sell land, and gives his own bond to make title, the purchaser cannot be compelled to pay the purchase money, unless he obtains the title, the more especially if the agent is insolvent.
3. Objections for want of proper parties, must be taken advantage of before the hearing.

Error to the Chancery Court at Tallapoosa.

THE bill was filed by the plaintiff in error, for the rescission of a contract, for the purchase of a tract of land. He charges, that on the 21st December, 1841, he purchased a tract of land (which is described) from Lemuel Merrill, who represented himself to be the properly authorized agent of the firm of Watson & Co., who it was represented by Merrill, and one Peter C. Harris, were the owners of the land, and in whose names the patent had issued. The company

was composed of James C. Watson, Edward Hanrick, Peter C. Harris, William Walker, and John Peabody. The purchase money was \$2,000, and for its payment three notes were executed, one for \$625, payable to P. C. Harris, on the 15th January, 1842, and two others, payable to D. McDougald, on the first January, 1843-4, each for the sum of \$687 50, and at the same time, a bond was executed by P. C. Harris, for James C. Watson & Co., with condition "to make a good title" to the land, upon the payment of the notes aforesaid, which was delivered by Merrill to complainant, and was attested by him, but that the bond was written, and signed by Merrill.

Complainant took possession of the land and improved it, to the value of \$1,000. That in the fall of 1843, ascertaining that the patent for the land he had purchased, had issued in the name of James C. Watson, in trust for the other members of the company, he called on Merrill for his authority to make the sale, who admitted that he had no written authority, but that his authority to sell was oral merely; and Watson being dead, complainant demanded his notes of Merrill, and offered to deliver possession of the land, and rescind the contract, which Merrill refused, and also sought for Harris to make the same offer, but could not find him. At the time of the offer to rescind, he offered Merrill to pay the whole purchase money at two hours' notice, if a good title could be made, but that Merrill admitted he could not make title.

That complainant has been greatly injured by the failure to make title, as the land has greatly decreased in value, being worth not more than the purchase money, with all the improvements. That neither Harris, or Merrill, were properly authorized to sell the land, and falsely represented themselves to be so, for the purpose of defrauding complainant. That Harris is insolvent, and Watson, Peabody and Walker, dead, and a great many persons interested in the land besides Watson & Co. That judgment has been recovered on the first note, and suit instituted on the other two. The prayer of the bill is for an injunction, for a rescission of the contract, and for general relief.

Merrill, in his answer, admits the contract as stated in the bill—admits that he signed the bond for titles, which he says

was done at the request of Harris, and as he believes, with the knowledge and consent of complainant. Insists that he was the authorized agent to sell the land, but admits his authority was not in writing, but that his sales were recognized by the company, and that each member of the company, in like manner was authorized to sell. That complainant did not demand to know, whether his authority was in writing, until some two years after the contract was made. Admits the offer to rescind, but that he had not the notes to deliver up; states that since the death of Walker, Hanrick has, by a decree of the chancery court of Montgomery, been declared a trustee for the company, and invested with full authority to make titles to the land, and has long since confirmed the sale to complainant. That the patent for the land was in his possession when he made the sale, and has been ever since, and he now exhibits it. That in virtue of the authority vested in Hanrick, by the chancery court, at the instance of the surviving members of the land company he has executed a deed to complainant for the land, which has been delivered to respondent as an escrow, to be given up to complainant on the payment of the purchase money of the land, which deed is appended as an exhibit to the answer, with an offer to deliver it, on payment of the price of the land. He denies all fraud, and insists that he has acted throughout in good faith.

The answer of Harris is in substance the same. The other parties to the bill, McDougald, Halford and Shorter, are alleged to be non-residents.

The chancellor dismissed the bill for want of equity. This is now assigned as error.

G. W. GUNN, for the plaintiff in error, made the following points :

1. Where one is induced to purchase lands, by the fraudulent representations of the vendor, by which an injury will accrue to the vendee ; he having no means of ascertaining by the exercise of ordinary diligence, the truth of the matter, the contract will be rescinded. [*Younge v. Harris*, 2 Ala. R. 108 ; *Camp v. Camp*, Id. 632 ; *Harris, et al. v. Carter's Adm'r*, 3 S. 233 ; *Spence v. Dunn, et al.* 3 Ala. R. 251 ; *Bullock v. Beemis*, 1 A. K. Marsh. 434 ; *Woodson, Adm'r, v.*

Scott, 1 Dana, 470 ; McCallister v. Barry, 2 Hay, 290 ; Densler v. Morris, 2 Edw. 37.]

2. More particularly where the only party liable upon the contract to convey, is insolvent, and has no title, at the time the vendee is entitled to conveyance. [Waggoner v. Waggoner, 3 Mon. 556 ; Williams v. Potts, 1 A. K. Marsh. 596 ; Webb v. Conn, 1 Litt. 84 ; Smith v. Peters, 1 S. & P. 107.]

3. Especially where the purchase was evidenced by the confidence in the ability, honesty, and integrity of the party making the sale. [Kennedy v. Kennedy, 2 Ala. 572.]

4. A want of title alone in the vendor, or party to the bond in the absence of fraudulent representations, before the acceptance of a conveyance, justifies the rescission of the contract, the vendee having a right to put an end to the same. [Miller v. Long, 3 A. K. Marsh. 334 ; Craddock v. Seiley, Ib. 288 ; Barkhamsted v. Case, 5 Cowen, 528 ; Morrison v. Caldwell, 5 Monr. 439 ; Rawlins v. Timberlake, 6 Ib. 230 ; Densler v. Morris, 2 Edw. 37.]

5. The title to the land being in the heirs at law of Watson and others, neither Merrill or Harris could make a valid sale, or control the title, otherwise than by a decree of a court of competent jurisdiction, upon a proper case made—the contract in this instance, conferred no such right upon complainant, and is therefore wanting in one of the necessary ingredients to the existence of a valid contract, and as such should be rescinded. [Allen v. Roberts, 2 Bibb, 98 ; Clay's Dig. 169, § 6.]

6. Where lands are sold by one professing to be an authorized agent, who makes false representations as to agency and titles, until affirmance by the alledged principal, an offer to rescind the same on the ground of fraud may be properly made to such agent, or party to such fraud. [Newell v. Turner, 9 P. 420.]

7. And upon an appeal to chancery for the rescission of such fraudulent contract, the heir, and other persons alledged to have an interest in the lands, are not necessary parties to a bill. [Baker v. Rowan, 2 S. & P. 361 ; Marr's Ex'r v. Southwick, et al. 2 Porter, 351 ; Bumpass, et al. v. Webb. 4 Porter, 65.]

8. Especially where the legal title was in a different person, at and before the sale.

9. If other persons were proper parties, defendants, the bill should not for this cause have been dismissed—such defect being amendable at any time—the court having the power upon such discovery, to decline hearing the cause until all necessary parties were brought before it. [Gayle, et al. v. Singleton, 1 Stew. 566; Milligan v. Milledge, 3 Cranch, 220.]

10. Where a purchase was produced by fraudulent representations, and there is a clear want of title and ability to convey on the behalf of the only party legally liable, and he is insolvent, no tender of money is necessary, in order to give the court jurisdiction—an offer to rescind, and place the parties in *statu quo*, being sufficient. [Gorman v. Bibb, 4 Porter, 84; Duncan v. Jeter, 5 Ala. 609.]

CHILTON and McLESTER, contra.

1. The issuance of the patent to Watson, in trust for Watson & Co., was in equity and law issuing it to the company.

2. An act by an agent not having a regular power, but whose acts were acknowledged and acquiesced in by his principal will bind the latter, [Weist v. Yode, 4 Bibb, 530.]

3. One partner cannot bind the others under seal without an express authority to do so—but such authority may be by parol. [See Skinner v. Dayton, 19 Johns. 513; 2 Johns. Ch. R. 526; 13 Johns. R. 307; Fisher v. Tucker, 1 McC. Ch. R. 170.]

4. Harris ratified the bond by taking the renewed note, as shown by the bill, after the bond was made.

5. A contract made under verbal authority to an agent, if it be evidenced by an instrument under seal, is binding on the principal, as a parol written contract, not subject to the plea of the statute of frauds.

6. The complainant shows no sufficient reason for going behind the bond—he received the bond personally, it was made and delivered to him at the time of the contract, with a perfect knowledge on his part of its contents, and he did not inquire whether the authority of M. or H. was in writing—

nor does he pretend that either of them represented that they were authorized by writing to sell the land.

7. This court will presume a ratification of the contract by Watson & Co. from long acquiescence—the complainant being in possession of the land undisturbed.

8. The value of the land at the forfeiture of the bond, is the measure of the damages, and the decrease in value after the sale, and before title required, gives no right to rescind the contract.

9. If Watson & Co. and J. C. Watson, are strangers to the contract, (as charged, but not stated in the bill,) then the notes given for the land are void for fraud, and the complainant's remedy is at law, and not in equity. [Knotts v. Tarver, 8 Ala. Rep.]

10. One who negligently, recklessly, or knowingly, or even ignorantly, purchases from an agent, who acts under defective authority, cannot rescind the contract without the consent of the vendor, or his refusal or inability to execute it—hence the vendor is an indispensable party to the bill.

11. The death of the vendor is no cause of rescision of the contract. The bill does not show when Watson, Walker or Peabody died. But complainant could have been ready, and would have paid the purchase money in January, 1844—in the event he could have procured titles—and would have made tender and demanded title but for the information received from Merrill, that he could not make titles, and there was no one who could.

12. To entitle the vendor to a rescision of the contract, the tender of the money and demand of title must be made, and must be made at or after the day stipulated in the contract for making the title. [Reid v. Davis, 4 Ala. Rep. 83; Wade v. Killough, 5 Stew. & P. 450; Steel v. Kinkle & Lehr, 3 Ala. Rep. 352; Clements v. Loggins, 2 Ala. Rep. 514.] Nor is it any objection that the title is not in the vendor anterior to the day at which it was to be made. [Clement v. Loggins, above cited.]

13. An offer to pay on two hours notice is no tender. [Seymore v. Bennett, 14 Mass. 266-7-8-9.]

14. Equity will not entertain a bill to rescind a contract

where there is a want of common and ordinary diligence. [Steele v. Kinkle & Lehr, 3 Ala. Rep. 352.] Nor impute fraud where the facts and circumstances out of which it must arise, may consist with pure intentions. [Ib.] The law is made for the vigilant and not for the sleeping.

15. The bill was properly dismissed for want of proper parties shown on its face. Complainant should have asked leave to amend if he desired it. [Singleton v. Gayle, 8 Por. 272.]

16. The bill should have been filed in Macon county, where the judgment enjoined was rendered, and where the resident defendants reside. [Shrader v. Walker, adm'r, 8 Ala. Rep. 244.]

ORMOND, J.—In our judgment, the chancellor erred in dismissing the bill for want of equity. The case made by the bill, is the sale of a tract of land, by one representing himself as fully authorized to sell, and by his bond for title in behalf of his principals, to enable the vendee to obtain a good title, on the payment of the purchase money, when in fact he had no written authority to sell, and therefore could not bind those for whom he professed to act.

It is true, that if the persons for whom the agent acted, confirms the sale made by him, it is binding on the complainant. He cannot complain in that event, as he gets all he stipulates for, and cannot found a right to a rescission of the contract, upon his own *laches* in not ascertaining the character, or extent, of the authority of the agent. [Lamkin v. Reese, 7 Ala. 170.]

If the *gravamen* of the bill, was the want of a written authority on the part of the agent, we should be strongly inclined to think, that an offer to rescind, made to the agent, would be insufficient, but that to entitle the vendee to a rescission, he should apply to the owner of the land, either to ratify, or reject the acts of the pretended agent. This seems to follow necessarily, from the admitted principle, that a ratification of, or acquiescence in the act of one, professing to act as agent, will be an admission of his authority to act. But here the allegation is, that the agent falsely, and fraudulently represented himself, to be the properly authorized agent of Watson

& Co., with full power to sell the land, and that a purchaser from him, would have a right to demand the legal title. These false representations, it is alledged, were made for the purpose of deceiving him, and getting his money without an equivalent. This is not the allegation of a mere defective authority, but is in truth an allegation, that no authority whatever, perfect, or imperfect, existed, but was assumed for the purpose of defrauding the vendee. Surely, conceding this to be true, as the motion to dismiss for want of equity does, the purchaser should not be compelled to pay his money, unless he obtains the title; the more especially as the obligor in the bond for title, is alledged to be insolvent.

It has been already stated, that ordinarily, the vendee in such a case, to entitle himself to relief, would be required to apply to the owner of the land, in whose name the agent professed to act, either to ratify, or disaffirm his acts. But here it appears, three of the persons, who are either legally, or equitably interested in the title to this land, have died since the sale was made, and the title descended to their heirs. This would of itself be sufficient, to dispense with such an allegation, and authorize a resort to chancery for the purpose of quieting the title.

It is doubtless true, that those for whom the agent professed to act, are necessary parties to such a bill as this, but this objection, if not taken advantage of before the hearing, would not authorize the dismissal of the bill for this cause.

The decision of the court, excludes the answers from our consideration. From them it appears, that the agent acted in good faith, upon a parol authority, and the sale has been since confirmed, and a title tendered upon the payment of the purchase money. This, however, in the present aspect of the case, cannot be considered. The decree must be reversed, and the cause remanded, for further proceedings.

THOMPSON, GUARDIAN, v. EVANS.

- i. When an attachment returnable to the county court, is levied on property, and a claim is interposed, and bond given to try the right, the trial of the right of property must be had in the same court in which the attachment suit was instituted, and not in the circuit court.

Error to the County Court of Washington.

THE plaintiff in error caused an original attachment to be issued against the estate of John Evans, jr., returnable to the county court, which was levied by the sheriff on two bales of cotton. An affidavit was made by the defendant in error, that the cotton was his property, and bond executed by him as directed by the statute, to try the right. This bond was returned to the same court with the attachment, and a trial there had by a jury, who found the cotton not subject to levy and sale to satisfy the plaintiff's demand, and judgment was rendered accordingly.

LESLIE, for the plaintiff in error, insisted that the county court had no jurisdiction to try the right of property, and cited 6 Ala. Rep. 625 ; 8 Port. Rep. 554.

No counsel appeared for the defendant.

COLLIER, C. J.—In Gregg v. Hinson, et al. 9 Port. R. 631, it was determined that the county court had appellate jurisdiction of a case of the trial of the right of property before a justice of the peace. But in Cullum v. Smith & Conklin, 6 Ala. Rep. 625, it was held, that the circuit court has exclusive jurisdiction of all claims interposed by third persons, to property levied on by *execution*, whether the execution issues from that, or some other court. In respect to both these decisions, it may be enough to remark, that they were

influenced by statutes applicable to such cases, and are not necessarily conclusive of the case at bar.

The eleventh section of the act of 1833, "concerning attachments," [Clay's Dig. 57,] among other things, enacts, that the goods, money and effects attached, shall remain in the custody of the officer levying the process, unless the defendant, his agent, or some other person replevy the same by giving bond, &c. ; or unless claim be made to the property levied on, and bond given to try the right thereto "as in other cases, on which the same proceedings may be had as in trials of the right of property taken by virtue of a *fieri facias* : in which cases the officer shall suffer the property to remain in the possession, and at the risk of the defendant or claimant. And the said replevin bonds, or bonds for the trial of the right of property, shall be lodged with the clerk or justice where the attachment is returnable ;" and should any such bond be forfeited according to its conditions, the officer taking the same shall forthwith enter thereon the necessary indorsement of forfeiture, and the clerk or justice shall immediately issue execution on the same, against all the obligors therein ; which duties of clerks and other officers, shall be performed under all the penalties, &c."

Justices of the peace are expressly authorized to proceed with the trial of the right of property, in cases originating before them, and the circuit and county courts are invested with appellate jurisdiction. And the acts of 1812 and 1828, which provide for such trials where a *fieri facias* is levied on personal property, confer jurisdiction on the circuit court, and by necessary implication, exclude the interference of the county court.

The trial of the right of property, where the levy was made by the initiatory process, may be regarded as between the plaintiff and defendant, in some sense, a part of the principal cause. If the property in controversy was all that was levied on, that suit could not progress until it was ascertained by a verdict and judgment, that the defendant had such an interest therein as was subject to his debts. But where the claim is interposed upon the levy of a *fi. fa.*, the trial is consequential to the judgment, and whatever be the result, the judgment will remain unimpaired. The connection then, between the

primary suit and the trial of the right of property, is perhaps more intimate in the former than in the latter case—it is certain that the same results do not follow in each. This being the case, perhaps induced a change by the legislature in respect to the exclusive jurisdiction of the circuit court ; or it may be, that the reorganization and extension of the powers of the county court since 1812, furnished a more potent reason for the modification of the law. But it is needless to speculate about the causes which induced a difference in phraseology between the acts of 1812, 1828, and 1833, since its existence is unquestionable. The latter enactment directs that bonds for the trial of the right of property attached, shall be lodged with the clerk where the attachment is returnable ; and upon the “indorsement of forfeiture,” the clerk shall issue execution against the obligors therein. The affidavit of the claimant, and the execution of the bond, is the formal mode of interposing the claim, and these being returned with the attachment, and indicating the proceedings thereon, the trial of the right must be had in the court in which the suit by attachment is instituted. If the legislature had intended to invest the circuit court with exclusive jurisdiction in such cases, it is fair to infer from the language employed in kindred enactments, that terms would have been used, manifesting such an intention. It follows from what has been said, that the objection to the proceeding of the county court is not well taken : its judgment is therefore affirmed.

RIDDLE v. DRIVER.

1. Where wood has been converted and made into coal, by the defendant, the owner is entitled to maintain trover for the coal.

Writ of Error to the Circuit Court of Talladega.

TROVER by Driver against Riddle, for fifteen hundred bushels coal.

At the trial, there was evidence tending to show a quantity of wood had been cut by the hands in the employment of the plaintiff, in the vicinity of a coaling ground, on public land. There was also evidence tending to show that these hands, when they cut the wood, were in the employment of the defendant. The plaintiff employed the men who hauled the wood to the coal pit. An agent for the defendant forbid these men to haul the wood for the plaintiff, but he told them to go on hauling the wood for the defendant, and they should be paid. The plaintiff told these men to continue hauling for him, and they should be paid. The evidence was conflicting and uncertain, as to whose employ the men were under, by whom the wood was burned into coal.

On this state of proof the defendant asked the court to charge the jury, that if the coal sued for, was converted by the defendant, whilst it was wood, the plaintiff could not recover in this action. This was refused, and the defendant excepting, it is now the only error assigned.

L. E. PARSONS, for the plaintiff in error, insisted, the plaintiff, by this action, abandons his property in the thing, as he is willing to accept damages for its conversion. If *wood* was converted, the identity is changed by transforming it to *coal*, and trover will not lie for the latter. [White v. Martin, 1 Porter, 215 ; Strong v. Strong, 6 Ala. Rep. 345, Lee v. Matthews, 10 Ala. Rep. 689 ; Lampton v. Preston, cited in 2 Pyrt. Dig. 303.]

J. T. MORGAN, contra, cited Glaze v. McMillan, 7 Porter, 279 ; St. John v. O'Connell, Ib. 466.

GOLDTHWAITE, J.—On authority, this case was correctly decided by the court below. It seems to have been a well settled rule of the ancient common law, that the owner of a chattel retained his right of property in it, so long as it was capable of being identified as the same thing, although its

form might have been entirely changed. [Viner's Ab. Prop. F, 5.] The precise question with reference to property in coal, where the wood belonged to the plaintiff, was determined in *Curtis v. Grant*, 6 Johns. 168. So, where logs were converted, and sawed into boards or shingles, it has been held that trover for the boards or shingles may be brought. [Betts v. Lee, 5 Johns. 348 ; *Brown v. Sax*, 7 Cowen, 95.] It is possible the jury might consider the value of the defendant's labor, on the rough material, in estimating the damages; but as to this we give no opinion, as no point upon it was made in the court below. The contrary, however, was held in the case last cited. Judgment affirmed.

BEAN v. PEARSALL.

1. A witness who has a certain, direct, and immediate interest, in the event of a suit, cannot be examined as a witness, though the record itself of the suit, would not be evidence either for, or against him.
2. An agent, is an exception to the general rule, and may testify, though he has an interest in the event of the suit.

Error to the Circuit Court of Franklin.

Assumpsit by the defendant in error. Upon the trial, the plaintiff introduced the deposition of John T. Abernathy, by which he proved, that he paid a sum of money over to the defendant, for the plaintiff, and on his account, which money was in the hands of Kirkman, Abernathy & Hanna, belonging to the plaintiff. In answer to the question, whether he was not interested in the event of the suit, he says, I am not, unless the fact of my being partner in the house of Kirkman, Abernathy & Hanna, might make me so, if they are liable to Pearsall, in the event he fails in this suit. This depo-

sition was objected to, on the ground the witness was interested in the event of the suit. The court admitted the deposition, and the defendant excepted, which is the matter now assigned as error.

J. A. NOOE, for the plaintiff in error, cited Maury's adm'r v. Mason, 8 Porter, 232; Buckland v. Tankard, 5 Term, 578; North v. Hicks, 1 Cow. 533; Ransom v. Keyes, 9 Id. 128; 18 Wend. 494; 2 Pick. 240.

W. COOPER, contra, contended that the testimony was properly received, and cited 1 Greenleaf's Ev. 416, and cases there cited.

ORMOND, J.—A witness cannot be permitted to testify, when the record of the suit, in which he is offered, would be evidence either for, or against him, and in this case it is clear, that if a suit should be hereafter brought against Abernathy, or the firm of which he is a member, by Pearsall, the judgment in this case would not be evidence. But although this question, when it can be answered in the affirmative, affords a perfect test of the incompetency of the witness, it does not follow that he is competent in all cases, where the record would not be evidence, for or against him. He may still have a certain, direct, and immediate interest, in the event of the suit, as he must have in all cases, where he is offered for the plaintiff, and by enabling the plaintiff to recover, prevents a suit from being brought against himself.

Thus in this case, the firm of which the witness is a member, having on hand a sum of money belonging to the plaintiff, is directed to pay it over to the defendant. Now, it is manifest, that if the money was not paid over, the firm is still liable to the plaintiff, and yet this is the very fact the witness is called on to prove, and by establishing the delivery to the defendant, and enabling the plaintiff to recover of him, may thus prevent a suit against themselves. Upon general principles, therefore, it would seem clear, that the witness was incompetent from interest, to testify in behalf of the plaintiff.

But an exception to the general rule, is well settled in favor of an agent, who may not only prove the fact of agency, but his acts as such. The case of *O'Brien v. Lou. State Bank*, 5 Mart. N. S. 305, is a strong case of this kind, where the teller of a bank, was held a competent witness for the bank, to recover money overpaid on a check. So, also, in the case of a cashier, (*Ib.* 310); yet in both these cases, it is evident the bank officers were responsible to the bank. In *Martineau v. Woodland*, 2 Car. & Payne, 65, the agent of the defendant, was held to be a competent witness for the plaintiff, though he had accepted a bill for the money in question; and see *Greenleaf on Evidence*, 416, and the authorities cited. This exception in favor of agents, rests upon the necessity of the case, from the inability in most cases of establishing the facts, if the agent is excluded. He is therefore a competent witness, though he has an interest in fixing a liability upon the party against whom he is called to testify, and the objection that he has such a bias, will go to his credibility, and not to his competency.

Judgment affirmed.

WICKS v. THE BRANCH BANK AT MOBILE.

1. When a garnishee answers, and upon special interrogatories referring to the answer, answers again more fully, and is discharged upon the last answer, both answers are to be considered as part of the record.
2. When a garnishee answers, admitting an indebtedness to the defendant, but also stating, that he has been informed, the defendant as a bankrupt has given in the debt in his schedule, and that it has been sold, and purchased under the decree in bankruptcy, by C. A. M., no judgment can be rendered against the garnishee, on the answer, but an issue should be tendered by the plaintiff. *Quere*, When the garnishee answers, that he holds funds of the defendant, to which the latter is entitled, for services rendered the State, in a public capacity, can any judgment be rendered?

Error to the Circuit Court of Mobile.

A garnishment, issued pursuant to the statute, upon affidavit, that the plaintiff had recovered a judgment, &c. against D. D. Kane and John F. Clark, on which a *feri facias* had been issued, and returned "no property found," &c., and it was believed the Branch of the Bank of the State of Alabama at Mobile was indebted to D. D. Kane.

The garnishee, through its officers, answered, disclosing the following facts. 1. At the time when the garnishment was served, the Branch Bank had in its possession the sum of sixty-five dollars, due to Kane from the State for services as commissioner on the part of the State to examine the bank. 2. The bank was not indebted to Kane at the service of the garnishment, but the latter was its debtor in the sum of \$9,454. 3. The officers of the bank have been informed that Kane has embraced in his assets in the bankrupt court, the \$65, which stands in the bank to his credit, and that C. A. Marston has become the purchaser thereof. 4. That this sum would have been paid to Kane on his demand, if other persons had not interposed and claimed the same.

Upon this answer the garnishee was discharged, and a judgment rendered against the plaintiff for costs.

G. N. STEWART, for the plaintiff in error, insisted, the first answer of the garnishee is no part of the record, and was not acted on by the circuit court. [3 Ala. Rep. 114.] The admission of the garnishee that sixty-five dollars were due to Kane, and that he would have received it on application, warrants a judgment against the bank. This sum had never been applied to satisfy *pro tanto*, the demand of the garnishee; nor had any purpose or wish been manifested by Kane, or the bank, thus to apply it. The answer, in respect to Marston's being the purchaser under the decree in bankruptcy, is not before the court, and is too vague and uncertain, to authorize the discharge of the garnishee on this ground.

J. W. LESESNE, for the defendant in error. The bank had the right to retain, to pay the debt due it from Kane. (Sergt. on Attach. 82 ; 6 Ala. Rep. 818.) But if this be not so, the compensation or salary due to an officer or individual for public services, cannot be attached. (Sergt. on Attach. 62, 140.)

If the answer is insufficient, it should have been objected to in the circuit court. (5 Ala. Rep. 583.) The answer is so referred to in the judgment entry that, it may, if necessary, be looked to, *to sustain it*. (6 Ala. Rep. 63 ; 3 Id. 114.) The fact of Marston's claim should have been contested by the plaintiff, and an issue made up to try it. (2 Ala. Rep. 177.)

It is not, however, necessary to look beyond the judgment entry, for this shows that the garnishee negatived an indebtedness, and cannot be contradicted by the answers found in the transcript, unless they had been brought before the court by bill of exceptions.

The State bank or its branches, cannot be garnisheed—their assets all belong to the State, and a judgment against such a garnishee, would operate against the State.

COLLIER, C. J.—What has been called, in argument, the first and second answer of the garnishee, cannot be separated, but must be considered together. The first is nothing more than the answer made without interrogation upon the service of garnishment : the second is the answer of the garnishee to interrogatories afterwards propounded to the bank, which specially refer to the answer on file, recite it in part, and call for a more particular disclosure. A judgment was rendered, upon the coming in of these answers, stating that the garnishee had denied an indebtedness to the defendant in execution, and rendering a judgment against the plaintiff for costs. At a subsequent term this entry was corrected *nunc pro tunc*, so as to make it appear that the garnishee was discharged on the answer on file, dated the 20th May, 1845 ; this appearing to be the date of the answers to the special interrogatories. This, we think, is quite sufficient, to make all the answers referred, a part of the record ; and it is competent to look to them, in determining the propriety of the de-

cision of the circuit court. [3 Ala. Rep. 114; 5 Ala. Rep. 583.]

It is perfectly clear that the answer of the garnishee does not admit a present indebtedness to Kane, or that it holds a sum of money to which he is entitled, or which would be paid to him on demand. The answer, it is true, admits that the bank is the depository of sixty-five dollars, the amount which the State owes him as a commissioner to examine the affairs of the bank; but this sum the garnishee has been informed, is embraced in the schedule rendered by Kane as a bankrupt, and under the decree in bankruptcy, has been purchased by C. A. Marston. Whether the information of the garnishee on this point, was correct, could not, in the condition of the record, have been inquired into in the circuit court. It was enough that the answer did not admit a debt to Kane, to have authorized the discharge of the garnishee. The case of Foster, Nostrand & Co. v. Walker, 2 Ala. Rep. 177, is directly in point, and is supported by many previous and subsequent adjudications. It was there held, that where the garnishee answers he has had notice of the assignment of the debt sought to be condemned, it devolves upon the plaintiff to contest the fact of the transfer, by tendering an issue as provided by the statute; and this although the garnishee does not affirm the fact or validity of such assignment. If an issue is not thus proposed, the garnishee must be discharged.

The bank was indebted to Kane, or held funds to which he was entitled, for services rendered the State in a public capacity. Can money due, under such circumstances, be condemned under process of garnishment? We incline to think not. If it could, then would it not be allowable for the bank to retain it in satisfaction of the debt due it from Kane. It is unnecessary to consider these questions further, for we have seen that the answer upon the other point considered, supports the decision of the circuit court. The judgment is consequently affirmed.

KING, ADM'R, v. CABINESS' CREDITORS.

1. Where an account cannot be stated in the first instance, by an administrator, the court at the final hearing is authorized to correct any errors or omissions apparent upon the account, or otherwise appearing.
2. An administrator *prima facie* is chargeable with interest under the statute upon all receipts until disbursement, and must discharge himself by oath.

Writ of Error to the Orphans' Court of Marengo.

KING, in January, 1838, was appointed administrator with the will annexed of William Cabiness. In March, 1839, he returned the estate insolvent. The transcript states this report was accepted, but no formal decree appears, declaring the insolvency. Subsequently, in 1840, a commission was appointed to audit the claims upon the estate, but nothing seems to have been done under this order. On the first Monday of April, 1843, a citation was ordered for the administrator to make a final settlement of the estate, on the first Monday of May then next. The citation was executed, and the settlement was continued from time to time, until the March term, 1844, when the proceeding seems to have been discontinued. A new citation was ordered in March, 1845, for a settlement on the first Monday of April of that year. Under this citation, the administrator appeared and filed his account current, consisting of several items of debit and credit, without date, showing a balance against him of \$4,954 43. No affidavit appears to have been made by him that he did not use the money, nor are the balances stated from year to year. The settlement was continued from time to time until the June term, 1846, when the court stated a new account against the administrator, showing a balance of \$6,811 19. The difference between the two accounts seems to consist of interest charged the administrator on the balances in

his hands from 1838, to the period of settlement. Distribution of that sum, was ordered between certain creditors named in the decree. No exception to the decree, or to any of the proceedings was taken by the administrator, but after the decree he filed a petition to set it aside, on the ground that he was absent when it was made. This was refused.

The administrator now sues out his writ of error, and assigns for error—

1. That the court proceeded to a final decree without the necessary preliminary steps being taken. 1. That the accounts and vouchers of the administrator were not filed. 2. Because the account was not examined, audited and stated for allowance.

2. In decreeing to the creditors, when there is nothing on the record to show they are creditors.

3. In basing the decree on an account current, when no such account appears.

4. In decreeing the balance of \$6,814 to be distributed.

5. In charging the administrator with the several items of interest.

6. In making a final decree in the absence of the administrator.

7. In rendering a decree for the several sums in favor of creditors.

8. In rendering any final decree.

E. W. PECK and LODER, for the plaintiff in error.

JOHNS and MANNING, contra, cited *Cunningham v. Pool*, 9 Ala. Rep. 615; *Brazeal v. Brazeal*, Ib. 491; *Clark v. West*, 5 Ib. 117; *Lambert v. Garber*, 6 Ib. 870; *Hearne v. Harrison*, 9 Ib. 731; *Davis v. Davis*, 6 Ala. Rep. 611; *Williamson v. Hall*, 6 Porter, 184.

GOLDTHWAITE, J.—1. No progress having been made toward the settlement of this estate under the final orders, it is necessarily governed by the act of 1843, (*Martin v. Baldwin*, 7 Ala. Rep. 923,) and the proceedings, so far as citation to the administrator, and notice to those having an ad-

verse interest, seem to be in strict conformity to that act. [Dig. 229, § 41, 42.] It further appears that the administrator, in obedience to the citation, stated an account current and although this is not the account which the court finally decreed, yet the restating the account upon the final hearing, is precisely what the statute directs. It is made the duty of the court, upon the final hearing to *audit and examine* the account, as well as to hear and determine any exceptions which may be made. This necessarily includes the authority to correct any matter in which an error appears, and the restating the account by the court is expressly directed. This power being ascertained, the assignments of error all fail, because there is no exception taken by the administrator to the action of the court at the hearing, and without which the decree cannot be examined on error. [Clark v. West, 5 Ala. Rep. 117, and cases there cited.]

2. This conclusion would relieve us from examining the imputed errors in the final decree, but as the one involving the only shadow of merit has been argued, we may as well state our conclusion upon it as a question of practice. The statute is very express, that an executor or administrator using the funds of the estate, shall pay interest, and in making their returns, they are required, (if the fact be so,) to deny on oath, that they have applied the funds to their own use. [Dig. 198, § 28.] *Prima facie* therefore, administrators are chargeable with interest upon all sums received until disbursed, and must discharge themselves by their own showing. [Brazeal v. Brazeal, 9 Ala. Rep. 491.] There was then no error in the court thus to correct the account stated by the administrator. We can perceive no error on the record. Judgment affirmed.

DULANY v. DICKERSON.

1. An action for money had and received, cannot be maintained by a landlord, against a purchaser from the tenant, of the crop grown on the rented land, but he may maintain attachment, under the statute, if the purchaser had knowledge of the *lien* of the landlord. Whether he might not also maintain an action on the case under such circumstances, *quere*.

Error to the Circuit Court of Talladega.

THE plaintiff sued the defendant before a justice of the peace, and obtained judgment, from which the defendant appealed to the circuit court, where the plaintiff declared in *assumpsit*. On the trial in that court, the following facts were in evidence. The plaintiff's demand was for the rent of land, for which he was to receive a part of the crop from one Wilson, the tenant. That Wilson sold the crop to the defendant, who removed it from the premises, without paying the rent due for that year, and that the plaintiff had sued Wilson, and recovered a judgment for the rent, which judgment was still in force, but that Wilson was insolvent.

Upon this evidence, the court charged the jury, that if Dulany had brought suit, and recovered judgment against Wilson, the tenant, although the judgment was unproductive, yet having elected to sue the tenant, he could not afterwards resort to his statutory remedy against Dickerson; and that upon the above facts, they must find for the defendant. This charge was excepted to, and is now assigned as error.

MORGAN, for plaintiff in error.

1. Tort may be the ground of *assumpsit*, and will support the action, where there is a contract expressed or implied, and the property is sold by the defendant, or converted to

his use. [10 Ala. Rep. 248; 5 Greenl. 323; 3 Dana, 552; Clay's Dig. 506, § 3.]

2. The statute gives a remedy in favor of a lessor against a lessee about to remove the crop from the premises, but is silent as to the remedy against any other person after it is removed by him, and it cannot affect the plaintiff's right that he elected to proceed at common law—both parties were bound for the rent to the plaintiff at any time they had the same in possession, respectively—the ground of the action here is the tortious interference with the plaintiff's lien, and it is not necessary that the relation of principal and surety should obtain between Dickerson and Wilson, (lessee,) to give the plaintiff a right of action. Dickerson became bound of his own wrong, for the value of the rents, by taking them from the premises, and the recovery against Wilson should not, at all events, bar a recovery against Dickerson, unless there was a *satisfaction* of the judgment against Wilson.

If Dickerson had pleaded a recovery and satisfaction against Wilson, by plaintiff, *puis darrein*, he could not have had judgment for costs against the plaintiff here. The judgment against Wilson was not for the condemnation of particular property; it was for a sum of money due, and there is nothing in the suit against Dickerson incompatible with the attempt to recover by action of assumpsit against Wilson the *amount* due for the rent, there being no lien of attachment, or satisfaction of the demand, to render the subsequent suit incompatible with the former. [J. W. & R. Leavitts v. Smith, 7 Ala. 183.]

3. There is no such thing as a man's waiving his right of action, when once a wrong has been committed, and the acceptance of goods converted does not bar an action for the conversion. [Ib. 182.]

L. E. PARSONS, contra.

1. The lien of the landlord does not give him such an interest in the crop as will enable him to sustain assumpsit for the value of the "rent cotton." A lien is said to be a right to have satisfaction of a debt out of a particular fund. But until the possession is changed, neither trover nor trespass could be maintained for an injury done to the goods. An ex-

ecution in the sheriff's hands creates a lien on the defendant's goods; yet the sheriff cannot maintain an action for any injury done to them, until after he has levied. An action on the case, by the party having the right, would be the proper remedy. But an action of assumpsit for rent will not lie at common law, except upon an express promise. [Bell v. Ellis, 1 S. & P. 294.]

2. But in this case the lien was lost by the landlord's election to pursue his tenant, Wilson, as a debtor, in the usual manner; and this act was well calculated to mislead the defendant in error, as it did in fact. It was equivalent to an agreement to look to the personal credit of his debtor. [Bailey v. Adams, 14 Wend. 201.]

ORMOND, J.—The case of *Thompson v. Spinks*, at the present term is a decisive authority, that this action cannot be maintained. In that case the landlord brought trespass against a sheriff, who had levied an execution against the tenant, on cotton produced on rented land, which the tenant had removed off the premises, without paying the rent. It was held he could not maintain trespass, because he had no property, either general or special, in the cotton, but merely a *lien* upon it, for the payment of the rent, and that not having either the actual possession, or the general property, which would draw to it the right of possession, he could not maintain trespass.

If then, the taking under such circumstances is not a trespass upon the landlord, it is difficult to perceive upon what principle an action of assumpsit, for money had and received would lie. When a trespass is committed upon the personal property of another, he may sue in trespass for the damages, or waiving the *tort* he may affirm it, and recover as upon a contract. But here there was no *tort* committed upon the plaintiff, nor was there any contract, either express or implied, on the part of the purchaser from the tenant, to pay the rent, and upon no principle, with which we are acquainted, could assumpsit be maintained to recover the value of the rent.

The statute gives the landlord an effectual means of recovering his rent, by declaring a *lien* upon the crop, forbidding its removal until the rent is paid, and giving the right

Berry, use, &c. v. Hardman.

to levy an attachment upon it, which may doubtless be done, though the crop has been removed, and is in the hands of a purchaser from the tenant, if he purchased with knowledge of the *lien* of the landlord. It is possible he may also by action on the case, pursue it under such circumstances in the hands of the purchaser, and thus enforce his *lien*, but he cannot maintain assumpsit against him. Nor are we prepared to say, that an unsatisfied judgment against the tenant for the rent, would interpose any obstacle to such an action. However this may be, it is clear the court correctly charged the jury, they should find for the defendant, as there could be no recovery against him upon the facts, in this form of action.

Judgment affirmed.

BERRY, USE, &C., v. HARDMAN.

1. Upon a trial of right of property, levied on by attachment, the claimant may prove, that the defendant in attachment, at the time he purchased the slaves levied on, declared that he paid for them with the land of the *cestuis que trust*, (in whose behalf they were claimed,) and purchased the slaves for their use, the *res gestae*, being the sale, and purchase, and not the possession of the slaves; such testimony would be no proof of *consideration*, if the attaching creditor's debt then existed.
2. A charge given by the court, must be construed, in connection with the testimony to which it is applied.

Writ of Error to the Circuit Court of Barbour.

AN attachment was sued out by the plaintiff in error, returnable to the circuit court, and levied by the sheriff on a female slave named Elva, and her child Jane, as the property of Cullen Cross, the defendant therein. The defendant in error interposed a claim to these slaves pursuant to the statute,

as the trustee of Sarah and Nancy Smith, and gave bond with surety to try the right. An issue being made up and submitted to a jury, a verdict was returned for the claimant, finding the property not subject to the attachment, and judgment was rendered accordingly.

A bill of exceptions, sealed at the instance of the plaintiff, exhibits the following case, viz: It was proved by the plaintiff, that the slaves in question were levied on while in possession of one Tolson, who had hired them from the claimant, on the same day that the deed of trust hereinafter referred to, was executed to the claimant. It was testified by one Fulton, that previous to the levy of the attachment, he saw the woman Elva in the possession of the defendant therein, who claimed her as his own.

It was then proved by the claimant, that when the defendant in attachment bought the slaves from him, that he (defendant) said he paid for them with the land of the *cestui's que trust*, and purchased the slaves for their use, and as their friend. Proof was also adduced that Cross had never paid one cent to the *cestui's que trust* for the slaves, and that he was indebted to them for other lands of theirs he had sold, and for work and labor of themselves and the woman Elva for one year or more.

The deed of trust referred to, purports to have been executed by the defendant in attachment on the 7th of February, 1846, and recites that he was indebted to Sarah M. Smith and Nancy J. Smith in the sum of \$700, as well as largely indebted to other persons, and was unable to pay all; and feeling that the debt here particularized should be first paid, as it was made in the purchase of the slave Elva; therefore he sold to the claimant the woman Elva, aged about thirty years, and her female infant child, Jane, for one dollar, and the consideration above expressed, in trust, for the payment of the debt of \$700. If that sum was not paid in two months from the execution of the deed, the trustee "shall put up a notice at three public places in Barbour county, and sell her at the market house in Eufaula, to the highest bidder for cash, and first pay himself for the expense of the deed, and apply the balance to the payment of said debt, and the remainder, if any, pay over to (him) me—said Hardman to keep

the negro until day of sale, or payment." This deed appears to have been acknowledged and recorded within less than thirty days after its date.

The plaintiff objected to the declarations of the defendant in attachment, as there was also other evidence showing that the slaves belonged to, or were purchased with the means of the *cestui's que trust*; but the objection was overruled, and the evidence permitted to go to the jury.

The court charged the jury, that if they believed from the evidence, that the slaves in question belonged either to the claimant, or the *cestui's que trust* mentioned in the deed, then they were not subject to the attachment, and they must find for the claimant.

P. T. SAYRE, for the plaintiff in error, made the following points: 1. The declarations of the defendant in attachment were clearly inadmissible to show with whose money he purchased the slave Elva. [McBride and wife, et al. v. Thompson, 8 Ala. Rep. 650; Gary v. Terrell, 9 Id. 206; Abney v. Kingsland & Co. 10 Ala. Rep. 355.] 2. The claimant must succeed upon the strength of his own title, and not upon that of the *cestuis que trust*, or any one else. [McGrew v. Hart, 1 Porter Rep. 175; Marriott & Hardesty v. Given, 8 Ala. Rep. 694.]

No counsel appeared for the defendant in error.

COLLIER, C. J.—In McBride and wife, et al. v. Thompson, 8 Ala. R. 650, we said, "the affirmation of the party in possession, that he held in his own right, or under another, is proper evidence as part of the *res gestae*," where the *res gestae* was "his continuous possession; but his declarations beyond this, are no part of the *subject matter*, or *thing done*, and cannot be received as such. While it is allowable to prove the statements of one in possession and explanatory thereof, it is not permissible to show every thing that may have been said by him in respect to the title; as that it was acquired *bona fide*, and for a valuable consideration; was paid for by the money of a third person, or his own, &c. This we have seen, instead of being part of the *res gestae*,

would be something beyond and independent of it." In *Goodgame v. Cole & Co.*, at this term, a material question considered, was whether the declarations of the purchaser were admissible upon a contract of sale, and it was there held competent to show all that the vendee said at that time touching the subject matter. It is a necessary result of the recognition of this principle, that it may be proved the vendee said he was purchasing for himself or another, and how, or with whose means he would pay for the property. That case is distinguishable from the case first cited, and others depending upon the same facts, on the ground that the *res gesta* which the declarations were intended to explain, was different. In the one it was the possession, in the other it was the sale and purchase under which the possession was acquired. The subject matter of the latter was more expansive—embracing not merely the conclusion of the bargain by the respective parties to the transaction; consequently, what was said pertinent to the treaty between them—the declarations as to the means of payment, whether the vendee acted for himself or another, may well be considered a part of the *res gestae*.

It was conceded in the case last cited, that such evidence was not entitled to any influence *as proof of consideration*, if the debt to the attaching creditor existed when the sale took place. Yet the declaration of the vendee would be most potent to show that the purchase was made for the benefit of the trustees, upon proof being made that the means of payment were furnished by them, or taken from their estate. In this view then, the claimant might have been prejudiced by their exclusion, and it therefore follows that they were rightly admitted.

The charge of the court is not as well expressed as it might have been, yet it must be understood in reference to the evidence in the cause. The liability of the property to the attachment was resisted by the claimant, by the introduction of the deed to him in trust for others, and extrinsic evidence in support of it. In instructing the jury, that if the slaves in controversy belonged either to the claimant or his *cestui que trust* mentioned in the deed, then they were

not subject to the attachment, the court could have meant nothing else, than if the deed had been so established as to make it operative against the plaintiff, he was not entitled to a verdict. It was not intended as an instruction to the jury, that the claimant might resist the condemnation of the property, by showing a title in the *cestuis que trust*, independent of the deed. Nothing of the kind appears from the bill of exceptions to have been attempted; and it cannot be supposed that the jury were induced by the terms in which the charge was expressed, to speculate about matters to which there was no evidence, or that they could have been diverted from the only material inquiry. There is then, no error prejudicial to the plaintiff, and the judgment of the circuit court is consequently affirmed.

FIELD'S ADM'R v. BEVIL.

1. Accounts of creditors of the defendant found amongst the papers of the plaintiff's intestate, receipted by the creditors, are, without aid from other proof, no evidence of the payment of money by the intestate, for the benefit of the defendant, so as to make these accounts sets off.
2. Nor does it change the effect of the evidence if the receipt expresses to be of the note of the defendant's intestate. Such receipt, by itself, is no evidence of an assumpsit for the plaintiff.

Writ of Error to the County Court of Marengo.

ASSUMPSIT on the common counts, by Bevil against Field, as the administrator of Joseph Bevil. The defendant, with other pleas pleaded *set off*.

At the trial, in support of this plea, and to prove the payment of divers sums of money by his intestate, at the request of the plaintiff, the defendant offered in evidence divers ac-

counts contracted by the plaintiff with various persons. These accounts were receipted by the respective creditors, without specifying by whom the payments were made thereon. The receipts bore date in the intestate's lifetime, and were found amongst his papers at his death. The plaintiff objected to this evidence on the ground there was no proof the accounts had been paid by the intestate, and the court sustaining the objection, refused the evidence.

The defendant introduced an account contracted by the plaintiff with Burke & Radcliff, insisting the same had been paid by the intestate in his lifetime for the plaintiff. At the bottom of this account was a receipt, signed by Burke & Radcliff, as follows: "Received payment by note of J. Bevil, March 29, 1840." Signed, B. & R. This was found amongst the papers of the intestate at his death.

On this state of proof the court charged the jury, this receipt was no evidence of payment without the production of the note.

The defendant excepted to this charge, as he did also to the refusal of the evidence offered, and both matters are assigned as error.

W. M. Brooks, for the plaintiff in error, made the following points:

1. The evidence rejected was admissible, and tended to prove the issue, and ought not to have been rejected for the reason that the same was inconclusive. [McKenzie v. McRae, 8 Porter, 70.] Inconclusive testimony should not be rejected until the whole evidence is closed. [Spears v. Cross, 7 Por. 437; Harrel v. Floyd and wife, 3 Ala. R. 16.] When evidence offered is admissible in itself, but insufficient to warrant the jury in finding a verdict, the court cannot assume that no further proof will be offered, and therefore reject the evidence. [Smith v. Armistead, 7 Ala. Rep. 698.]

2. The giving of the note, as shown by the receipt stated in the bill of exceptions, was a payment of the account. [Cumming v. Harkly, 8 Johns. 159; Johnson v. Weed, 9

Ib. 320; *Armstrong v. Garrow*, 6 Cowen, 470; *Douglass & Proctor v. Gooch*, 2 Esp. Rep. 591; 6 Cranch, 253; *Pinkston v. Taliaferro*, 9 Ala. 350; *Robertson v. Maxey*, 6 Dana, 101; *Harrison v. Harrison*, 8 Ala. 73.] The case quoted from 9 Ala. 350, is an authority to show that one surety can settle a debt by giving his own note, and then sue his co-surety for contribution.

3. Where evidence is circumstantial and inconclusive, the jury, and not the court, are the sole judges of its effect. [*McKenzie v. McRae*, 8 Por. 70.] And the receiving a note under the circumstances, is *prima facie* evidence of the payment of the amount. [*Hutchins v. Olcutt*, 4 Verm. 555.]

4. When the court rejects evidence, or charges the jury that it is insufficient to prove the issue, the party offering it is entitled to all the benefits arising upon a demurrer to evidence.

HENLEY, for the defendant in error, insisted—

1. That to authorize the defence of set off, as set up in the court below, the proof must show such a state of facts as would authorize a recovery in an action for money paid.

2. That to entitle the party to such action, it would be necessary for him to prove—1. The payment of the money. 2. That it was done at the express or implied request of the defendant. The proof offered in this case does not tend to prove either the one or the other. The mere possession of the accounts, unexplained, amounts to nothing—especially when it was in the power of the party to show, by the several creditors, by whom the money was paid.

It was the duty of the party to show the relevancy of the proof offered, by showing its connection with other testimony in his power. [8 Port. 176; 6 Ala. R. 390; 7 Ib. 457; 2 Stark. on Ev. 381; 5 Litt. 272; *Cowen & Hill's Notes*, 434, 792; 4 Ala. Rep. 443; 5 Monr. 33; 11 Wendell, 422.]

3. The receipt of *Burke & Ratcliff* is no evidence of payment of money. It purports to be a payment by the note of J. Bevil, defendant's intestate, and there was no evidence that the note had been paid—until the note was paid, it would not be good as a set off against the plaintiff's debt. The giv-

ing of a note has been often held not to be sufficient to authorize a recovery in an action for money paid. [Witherley v. Mann, 11 J. R. 520; Cummings v. Hackley, 8 J. R. 202; 4 Ph. on Ev. 119, 120; Ib. 221, 223, in notes 348, 349; 2 Saund. on Pl. & Ev. 192; 2 St. on Ev. 57.]

GOLDTHWAITE, J.—1. It is possible the excluded evidence might be proper if aided by other proof showing the payment of these accounts by the intestate, but without aid from other sources, the mere fact that they were found in his possession, certainly did not sustain the issue. *Prima facie*, this proof was irrelevant, and as such, if insisted upon as proper to go before the jury, the defendant should have intimated his intention to sustain it by other evidence. When evidence is offered seemingly irrelevant to the matter in issue, it is the duty of the party offering it, to show how it can be made relevant by connection with other facts or circumstances to be offered, or already in evidence. [Crenshaw v. Davenport, 6 Ala. Rep. 390, and cases there cited.]

2. The other point is equally clear against the defendant. The receipt of a third party, indicating that he had received the note of the defendant's intestate in payment of an account contracted by the plaintiff, was certainly no evidence to charge the latter, either with or without the note. It may be, for any thing which appears, that the note thus spoken of, was given by the intestate upon some other consideration than money from the plaintiff; at any rate, it is no evidence of an assumpsit, even on account of, or at the request of the plaintiff.

Judgment affirmed.

FELDER v. HARPER.

1. A reservation in a deed of gift, of a remainder in a slave to a third person, after the termination of a life estate, is within the statute of frauds, and void as against the creditors of the tenant of the life estate, after the lapse of three years, unless the deed is recorded as the statute directs.
2. A consideration of \$10, expressed in a deed of gift of two slaves, is on its face merely nominal.

Error to the Circuit Court of Macon.

DETINUE by the defendant in error, for a female slave.

From a bill of exceptions, it appears, that the plaintiff below deduced his title to the slave, as a purchaser at a sale made under a mortgage, or deed of trust, executed by one John Davis, to William Blount and Felix Stanley, to secure the payment of a debt there recited. The defendant's title is thus stated: Budd Davis, the father of John Davis, on the 16th of October, 1837, conveyed the slave in controversy, and another, to him, upon the following conditions: "Said John Davis is not to have possession of said negroes, until after the death of said Budd Davis, but so soon as Budd Davis is dead, the said John is to have possession of said negroes, and use them as he thinks proper during his life; but should said John die without a wife, or child, the above named negroes is to go to the children of Elizabeth Felder, daughter of said Budd Davis."

The deed was recorded in the office of the clerk of the county court of Chambers, but the execution of the deed does not appear to have been proved previous to its registration.

It was proved that the slave remained in the possession of Budd Davis, until his death in 1838, and then went into the possession of John Davis, and so continued until his death in 1840. That Elizabeth Felder, at the date of the deed, had children then in being, all of whom are yet living. The plaintiff had no notice of the existence of the deed of gift, unless the registration of the deed was notice.

The court charged the jury, that the deed was not properly recorded, and if they believed from the evidence, that the plaintiff was an innocent purchaser of the slave, for a valuable consideration, and had no notice of said deed, the deed could not vest title in another so as to defeat plaintiff's right. This the defendant excepted to, and now assigns as error.

DOUGHERTY & COCKE, for plaintiff in error.

1. The last clause of the second section of the statute of frauds must be construed *ex vi terminiorum*, to refer to reservations and limitations, &c. in favor of the donor, and not to such as are created in favor of third persons.

2. The deed from Budd to John Davis was founded upon a *valuable* as well as a good consideration, and therefore the remainder is within the exception of the statute. The smallness of the consideration is wholly unimportant. [Tatum, et al. v. Manning, 9 Ala. 144.]

3. The charge of the court was erroneous in assuming that the plaintiff below had proven a three years' possession of the slave by John Davis and those claiming under him, without demand made and pursued by due course of law—a fact, which it was incumbent on the plaintiff to prove, and the sole province of the jury to pass upon. [Daniel v. Daniel, 1 Dana, 238.]

McLESTER, contra.

ORMOND, J.—It is not contended that the deed under which the defendant asserts title was duly recorded, and the only question is, whether the deed without registration, is sufficient to secure the remainder to the children of Mrs. Felder, after the termination of the life estate of the tenant for life.

This question appears to be decisively settled, by the cases of Myers v. Peek, 2 Ala. R. 648; The Bank v. Croft, 6 Id. 622; Johnson v. The Bank, 7 Id. 379, and Tatum v. Manning, 9 Id. 144. In those cases, it is held, that unless the precedent estate is supported by a valuable consideration, the reversion, or remainder, is void after the lapse of three years' possession by the grantee, without demand made, or pursued

by due course of law, as against the creditors, or purchasers of the person so remaining in possession, unless such reversion, or remainder, was declared by will, or by deed, recorded as the statute directs. The statute is not confined to a reservation in favor of the donor, but applies equally, to a reservation in favor of third persons. The language of the act is, "or where any reservation, or limitation, shall be pretended to have been made of a use, or property, by way of condition, reversion, remainder, or otherwise, in goods or chattels, the possession whereof," &c. It cannot, we think, admit of doubt, that a remainder, in favor of a third person, is within the letter of the statute, as well as the mischief intended to be prevented.

It is however contended, that the deed from Budd, to John Davis, is upon a valuable consideration. The deed recites, that it is made upon the consideration of \$10, paid by the latter, to the former. This is evidently on its face a mere nominal consideration, the conveyance being of a life estate in two slaves, in the event the grantee died without a wife or children. It is a conveyance from a father, to his son, which is not to take effect until after the death of the father, and is clearly on its face a gift, and cannot be converted into a sale, by the insertion in the deed, of a mere nominal consideration.

The argument, that the court in its charge, assumed, that possession had remained with the donee for three years, and thereby prevented an inquiry by the jury into the fact, whether such a length of possession had been proved, cannot be urged in this court. No question was raised upon this point in the court below, so far as we can judge from the bill of exceptions, but the question there seems to have been, whether the deed was valid without registration, as against a purchaser for a valuable consideration from the tenant for life. It is stated in the bill of exceptions, that John Davis went into possession in 1838, but at what time during the year is not set out. The sale was made to the plaintiff on the 7th June, 1841. It is clear, therefore, that the possession may have remained with John Davis, and those holding under him, in virtue of the deed of trust, for more than three years previous to the sale to the plaintiff, and as this question was

not raised in the court below, we must presume that such was the fact. It is inconceivable, if the fact were otherwise, that it should not have been made distinctly to appear upon the record, as there would then have been no pretence that the statute of frauds applied to the case.

Let the judgment be affirmed.

McDANIEL v. REED.

1. The answer of a garnishee must be contested at the term at which it is made; and if an issue be subsequently tendered, he may object to joining in it, unless he has expressly, or by implication, waived his right to a discharge.

Writ of Error to the Circuit Court of Perry.

On the 26th of April, 1843, the defendant in error caused a garnishment to be issued against the plaintiff, upon an affidavit that he was believed to be a debtor of John Scarbrough, against whom the plaintiff below had obtained a judgment, and who had no property from which it could be satisfied. At the term of the circuit court holden in 1844, the garnishee answered in the negative all the questions addressed to him in the process, prayed a reasonable allowance and to be discharged: afterwards, at the fall term of the same year, the plaintiff denied in due form the truth of the answer, and proposed to make up an issue to try its truth. The cause was continued, either by the court or the plaintiff, without any notice having been taken of the answer, or the affidavit controverting it, until the spring term of 1847, when the garnishee, notwithstanding his objection, was required to join in the issue tendered. Thereupon the cause was submitted to a jury, who returned a verdict for the plaintiff, stating that the garnishee was indebted to Scarbrough in the sum of one

hundred and ninety-eight dollars, and judgment was rendered for that sum against the garnishee, though it greatly exceeded the amount of the judgment against Scarbrough.

JOHNS, for the plaintiff in error, insisted that the answer of the garnishee not being contested at the term at which it was filed, an issue could not be made up at a subsequent term against his consent. [8 Ala. Rep. 431, 811; 9 Ala. R. 223; 10 Ala. Rep. 451.] *Further*, the judgment against the garnishee was for a larger sum than the plaintiff had recovered in the first judgment.

A. B. MOORE, for the defendant in error, contended, that as the garnishee did not move his discharge, but allowed the case to be continued for several years after his answer was filed, he must be taken to have waived all objection to the time of tendering an issue by the plaintiff.

COLLIER, C. J.—In *Graves v. Cooper*, 8 Ala. Rep. 811, it was decided, that the defendant whose debtor is summoned as a garnishee, will not be permitted to contest the garnishee's answer, unless it is done at the term when the answer is filed. And in *Lockhart v. Johnson*, 9 Ala. Rep. 223, it was said, that when a garnishee submits to answer, he is considered as continuing before the court, for the purpose of receiving its judgment; but if the cause is continued generally by the court as to him, he cannot be compelled to join in an issue tendered to his answer, either by the plaintiff, or defendant, in the principal suit; and if an issue then tendered for the first time, is made up and found against him, the judgment thereon will be reversed on error, if there is no admission upon the record, either express or implied, which takes from him the right of insisting upon the irregularity.

These cases very conclusively show, that it was not incumbent upon the garnishee to submit to the court a distinct motion for his discharge—it is enough that he has made an answer to which there is no objection; if this has been done, and he has made no admission, expressly or by implication, to estop him, he may object to submitting an issue to a party to try its truth at a subsequent term. In the case at bar, the

garnishee, by his answer, prays his discharge. The record does not show any waiver of his privilege, and the continuance by the court, or at the plaintiff's instance, cannot have that effect. The circuit court then, should not have compelled the garnishee to join in the defence.

The fact that the jury ascertained the extent of the garnishee's indebtedness to the judgment debtor, will not entitle the plaintiff to recover of the garnishee a larger sum than the amount of the judgment, with interest and costs. But the error in this particular does not authorize a reversal of the judgment—it was competent for the court below to have corrected it, and this court, in a proper case, could order the correction to be made at the costs of the plaintiff in error. [Ansley v. Pearson, et al. 8 Ala. R. 431.]

What has been said sufficiently indicates the error of the circuit court, and the judgment is consequently reversed.

SCALES v. ALVIS

1. A sale of land for taxes cannot, under our statutes, be sustained where the delinquent, at the time of the distress, has goods and chattels within the county.
2. No personal property is exempt from levy and sale, when the object is the collection of delinquent taxes.
3. An advertisement of lands for the sale of taxes must be published three months, (in the case of resident delinquents,) and two irregular advertisements for that space of time, cannot be coupled together, so as to authorize the sale, although a verbal consent to this course is given by the delinquent.

Writ of Error to the Circuit Court of Talladega.

TRESPASS to try title by Scales against Alvis.

At the trial, the plaintiff made title to the land in contro-

versy, through a deed made by the collector of taxes of said county, under these circumstances, to wit: The land was patented to one Nicholas Scales, in August, 1837, and with other lands and personal property of said Nicholas was assessed for his taxes in 1842. During which year said Nicholas had in his possession sufficient personal property to pay the taxes thus assessed, but refused to pay them to the tax collector. In the latter part of the year 1842, the tax collector called on the said Nicholas for his taxes, who then, as before, refused to pay, but gave the land in controversy, by number and description, to the tax collector for payment. During this year, the tax collector could have made the amount of taxes assessed, by selling personal property belonging to said Nicholas. On the 4th of January, 1843, the tax collector advertised the property in controversy, in a newspaper published in said county, to be sold for the taxes assessed against said Nicholas, on the 1st Monday of February then next. The tax collector having ascertained this notice to be too short, did not sell the land at the day fixed, but in the first publication made after that time, changed the time of sale in the advertisement, and fixed it for the first Monday of April then next, at which time it was sold to the plaintiff, who received a deed from the tax collector. The said Nicholas was personally notified by the tax collector, of the different times fixed for the sale of the land, and consented to it. It was in proof, that in the latter part of the year 1842, the only property in possession of said Nicholas was a yoke of oxen, which he claimed was exempt from execution under the statute.

On this state of proof, the court charged the jury—

1. That under the statutes, personal property should be sold for taxes before real estate is liable. 2. That no property is exempt from being sold for taxes. 3. That the two notices of the times of sale was not a sufficient compliance with the statutes.

The plaintiff asked the court to charge, that if said Nicholas had personal knowledge of the time fixed for the sale of the land, and consented thereto, and gave the same in to the tax collector, for sale, to pay the taxes assessed, then they should find for the plaintiff under the other facts stated.

This was refused, and the plaintiff having excepted, the charges given, as well as the refusal to give that requested, are now assigned as error.

J. T. MORGAN, for the plaintiff in error.

PARSONS, contra.

GOLDTHWAITE, J.—1. The revision of the statutes prescribing the manner of selling lands upon which the taxes have not been paid, is greatly to be desired, inasmuch as the numerous alterations at different periods have so perplexed the system, that it is quite difficult to ascertain what course is proper, and the result is, that the purchaser, instead of securing the land, or even a safe investment for the money expended, finds himself involved in an expensive litigation, almost always productive of no other end than that of vexation to himself and to the land owner. It certainly deserves consideration from the proper department of the government, whether it would not be better to facilitate the recovery of the land by the purchaser, and allowing the owner a longer time for redemption. With these preliminary remarks, we proceed to the examination of the questions presented by this record.

It may perhaps be stated, as the general rule pertaining to sales of this description, to which no exception has come within our notice, that every prerequisite of the statute directing the sale, must be substantially complied with, or the sale will be illegal. [Lyon, et al. v. Hunt, et al. 11 Ala. Rep. 295; Rackendorf v. Taylor, 4 Peters, 340; Williams v. Payton, 4 Wheat, 77; 5 Hayw. 90; Davis v. Sims, 4 Bibb, 465; Holt v. Hemphill, 3 Ohio, 232; Birch v. Fisher, 13 S. & R. 208; Bush v. Davidson, 16 Wend. 550; Cook v. Sheppard, 7 Cowen, 88; 14 Mass. 177.] Now, when the statute is looked at, it will be seen to contain this provision: "All lists of taxes shall be considered as having the force and effect of an execution; and it shall be lawful, from and after the first day of September, to proceed and make distress and sale of the goods and chattles, lands and tenements, of all persons in arrear for taxes; *provided*, that notice of such sale shall have been given, by advertisement at the court house of the pro-

per county, and at least two other public places within the county, at least ten days previous to the day of sale, where the distress shall be of goods and chattels; *and where the delinquent has no goods and chattels within the county, then the lands and tenements of said delinquent may be sold by the collector, or so much, &c.* *Provided, That the collector shall have given, in the nearest newspaper published within the State, at least three months notice, and in case of non-residents, at least six months notice, of the time and place of sale, which notice shall contain," &c.* [Dig. 566, § 50.] It will thus be seen, the power of the collector to sell lands is limited to those cases where the delinquent *has no goods or chattels within the county*. There is no provision made for cases where the collector is unable to find, or the delinquent unwilling to surrender goods. The power exists only where there are no goods, and conforming to the principle of the many cases on this subject, we are constrained to declare, that as there was personal property of the delinquent within his county, the collector had no discretion to sell the land. [Cook v. Sheppard, 7 Cowen, 88.]

2. The fact that the property then possessed by the delinquent was exempt by law from being sold under ordinary executions, does not, in our opinion, prevent the operation of the general tax law. It is impossible, we think, by any proper construction of the statute which exempts certain property from execution, to consider the exemption as extended to the case of defaults for taxes. Without resting our opinion upon this point, on the principle that the State is not bound by a statute unless named in it, we think it clear the one referred to was not intended to create an exemption, when the revenue of the State is to be collected.

3. The only other point in the charges given, is covered by the precise terms of the statute. Neither of the advertisements covered the space of three months, and the supposed consent of the delinquent to the amendment, by extending the time after it had received one months' irregular publication, cannot invest the collector with the authority to sell. That, as will be seen by the cases already referred to, must be derived from a strict compliance with the statute. [See

also Haughey v. Harrell, 2 Ohio, 231 ; Jackson v. Esly, 7 Wend. 146.]

The charges which the plaintiff requested are sufficiently considered in what has already been said. Our conclusion is, that the record presents no error.

Judgment affirmed.

STRODE, ET ALS. V. CLARK.

1. A trial of right of property may be prosecuted in the name of an infant, by a *prochein ami*, who may execute the bond, and if necessary make the affidavit required by the statute.

Error to the Circuit Court of Sumter.

THE defendant in error, sued out execution against Charles E. B. Strode and Harriet S. Strode, which was levied on certain slaves, and thereupon, Matthew Houston, as the next friend of the plaintiff in error, made affidavit, that he verily believed the property levied on, belonged to certain minors who are named, and prayed a trial of the right, and also executed a bond with surety, conditioned as the statute directs, in cases of trial of the right of property.

At the trial of the cause, the plaintiff moved to dismiss the claim, because prosecuted on behalf of an infant, which was sustained by the court, and the claim dismissed. This is the matter now assigned for error.

R. H. SMITH, for plaintiff in error.

J. B. CLARKE & HOIT, contra.

ORMOND, J.—We need not enter upon the inquiry, how suits were first allowed to be prosecuted in behalf of an in-

fant, by a *prochein ami*, or whether the right existed at common law, or was conferred by the statutes of Westminster, 1st and 2d, as the legislature of this State has expressly conferred the power, in the following comprehensive language: "In every case, where persons who are within age, may sue, their next friends shall be admitted to sue for them." [Clay's Dig. 336, § 130.] The only question, therefore, to be considered, is, whether infants are embraced in the class of persons who may try the right of property, when an execution issued against another person, is levied upon property to which they assert a title.

The language of the act is, "where any sheriff shall levy execution on property claimed by any person, not a party to such execution, such person may make oath to such property, and it shall then be the duty of the sheriff," &c. It is evident that an infant might make the oath which is here required, but it is argued that he cannot execute the bond, which the sheriff is required to take from the claimant, before delivering to him the property. Although an infant, being unable to execute a bond, may thus be disabled from a literal compliance with the statute, we do not think this a sufficient reason for refusing the benefit of the law, to this class of persons, when all the objects the law had in view may be accomplished, by the execution of the bond by a *prochein ami*. The act is general, giving this remedy to all persons, whose property is wrongfully levied on to pay the debt of another, and if he happens to be an infant, he may under the provision of the act first cited, assert his rights through the medium of a *prochein ami*, who will be responsible to the other party for the production of the property, as well as for the costs, if the infant is cast in the action.

The argument, that it is not for the benefit of the infant to permit the claim to be asserted in his behalf, by his next friend, because the claimant, if successful, would be entitled to the possession of the property, and might waste it, is founded on a misapprehension of the statute. The act requires the sheriff, upon the execution of the bond, "to return the property levied upon, to the person out of whose possession the same was taken," so that the property in such a case, would be returned to the proper custodian, and the execu-

tion of the bond would give the *prochein ami* no right to the custody, or possession of the property levied on, if he did not have it at the time of the levy. The argument here urged, if sound, would prove, that an infant could not prosecute our statutory action of detinue, and it follows, that since the action of replevin has been held to be obsolete in this State, there would be no means left, by which infants could adequately protect their possession of personal property at law, and would be compelled to seek redress by an action of trespass, after the wrong had been committed. The common law furnished this precautionary means of redress, by the action of replevin, which was the mode of our statutory actions of detinue, and trial of right of property; and it would be strange indeed, if infants requiring greater protection than others, should be placed in a worse condition, by a statute designed to give to every one a more full, and adequate means, of protecting his property against invasion.

The statute is general in its terms, and gives the right to all persons whose property is improperly levied on to pay the debts of another. It was doubtless intended to include infants, and it follows, that as in other cases, it may be prosecuted in their names, by a *prochein ami*, who may execute the bond, and if necessary, make the affidavit required by the statute.

The objection that the *prochein ami* is the party who appears upon the record as claimant, appears to rest upon the statement of the case by the clerk. The affidavit, and bond, disclose the true character of the *prochein ami*, and that he is prosecuting the suit not for his own benefit, but as the next friend of the minors, and this cannot be altered by the statement of the clerk, that he is the claimant.

Let the judgment be reversed, and the case remanded.

LESTER v. THE GOVERNOR.

1. A justice of the peace who takes insufficient surety upon an appeal bond, is not individually responsible, unless it be shown that he acted from corrupt, or impure motives.
2. Whether the sureties of a justice upon his official bond are bound for the official malversation of their principal, and whether the bond was not intended as a security for the performance of his ministerial duties only, *quere*.
3. If the bond was lost after the declaration was filed, the contents may be proved, without an amendment of the declaration.

Writ of Error to the Circuit Court of Fayette.

THIS was an action of covenant at the suit of the defendant in error, against Lester and his surety, on the official bond of the former, as a justice of the peace. The breach alledged is, that the beneficial plaintiff recovered a judgment against one Miles Jennings, before the defendant, Lester, and that the latter granted the defendant in the judgment an appeal, and accepted and approved a bond for its prosecution, with a surety which he knew to be insolvent. There was a demurrer to one of the pleas, which was sustained, and the cause was then submitted to a jury, who returned a verdict for the plaintiff, on which judgment was rendered. The defendant excepted to the ruling of the court, and the points presented by the demurrer and the bill of exceptions, may be thus stated: 1. As the plaintiff made profert of the bond in his declaration, was it allowable to prove its loss since the institution of the suit, and give secondary evidence of its contents. 2. Where, from the opinions of others, it is doubtful whether a surety offered for an appeal is solvent, is the justice of the peace liable for taking insufficient security, if the party offered, declares on oath, that he is amply able to satisfy any judgment which may be rendered against him in the case. 3. Is a justice of the peace liable for taking in-

sufficient surety for an appeal, unless both neglect and fraud are attributable to him ; or is he liable under the same circumstances that a clerk or the sheriff would be, if they were to fail to take sufficient sureties in cases where they are authorized to act.

B. W. HUNTINGTON, for the plaintiff in error. In approving an appeal bond, a justice of the peace acts *judicially*, and not as a mere ministerial officer, (1 Day's Rep. 315 ; 7 Cow. Rep. 487,) and he is not in such case liable for an error of judgment. [5 Mass. Rep. 559 ; 1 Ld. Raym. 454 ; 2 Id. 767.] There is no statute making a justice liable for mere neglect in taking a bond, and without which he is not chargeable. [1 Root's Rep. 165 ; 7 Yerg. Rep. 277.] The justice relieved himself from the charge of neglect, by having examined the surety on oath as to his sufficiency. [2 Dev. Law Rep. 17 ; 13 Ohio Rep. 157.]

P. MARTIN, for the defendant in error. If a justice of the peace take insufficient security upon granting an appeal with a knowledge of the fact, he is liable. [1 Root's Rep. 165 ; 1 Day's Rep. 328 ; 4 Conn. Rep. 107.] He is, not only in preparing, but in approving the bond, a ministerial officer, and for neglect, or other official impropriety, is liable. [14 Mass. Rep. 205 ; 10 Id. 356 ; 19 Johns. Rep. 223 ; 8 Wend. Rep. 468.] It is conceded that in his *judicial acts*, he is not liable for errors of judgment.

COLLIER, C. J.—In receiving a bond for the prosecution of an appeal, it has been held that a justice of the peace acts as a ministerial officer, and if he refuses it without objection to its legal sufficiency, an action on the *case* will lie against him. [The People v. The Judges of Dutchess, 7 Cow. Rep. 487 ; Butler v. Kent, 19 Johns. Rep. 223 ; Tompkins v. Sands, 8 Wend. Rep. 468.] But the approval of a surety who has executed, or proposes to execute a bond, is a judicial act. [The People v. The Judges of Dutchess, *supra* ; Smith v. Trawl, 1 Root's R. 165.]

In Tracy v. Williams, 4 Conn. Rep. 107, it was held, that

a judge who transcends his powers, and acts in a matter *coram non judice*, usurps an authority beyond, and independent of his office, and can claim no protection from it; and may be charged as a trespasser. But for the most flagrant error of judgment he is not liable in trespass. [See also, Henderson v. Brown, 1 Cain's Rep. 90; Butler v. Potter, 17 Johns. R. 145; Griffin v. Mitchell, 2 Cow. Rep. 548; Calvin v. Luther, 9 Id. 64; Savacool v. Boughton, 5 Wend. Rep. 177; Dillingham v. Snow, 5 Mass. Rep. 559; Easton v. Calendar, 11 Wend. Rep. 90; Jackson v. Roe, 9 Johns. Rep. 77; Vosburg v. Welch, 11 Id. 175; Yates v. Lansing, 9 Id. 395; Bordeaux v. Clark, 2 Bailey's Rep. 6; 6 Bing. Rep. 35; Percival v. Jones, 2 Johns. Cases, 49; Reid v. Hood, N. & McC. Rep. 168.]

It has been held, that a judge is not liable for a mere error of judgment, in doing, neglecting, or refusing to do a particular official act, in the exercise of *judicial power*—it being a settled principle, that for these a judge cannot be questioned in a civil suit. [Phelps v. Sill, 1 Day's Rep. 315, 329; Lining v. Bentham, 2 Bay's Rep. 1.] In Parmelee v. Baldwin, 1 Conn. Rep. 313, the selectmen of a town appointed an overseer over a person from *malice*, and they were held liable in damages. If a justice of the peace acts within his jurisdiction, it has been decided that he is not responsible for an erroneous judgment, and such judgment is a justification to the officer in carrying the judgment into execution. [Walker v. Floyd, 4 Bibb's Rep. 237.] And an action will not lie against him for an act done judicially, and within the scope of his jurisdiction, unless he acts corruptly, or from impure motives. [Gregory v. Brown, Id. 28.] So in Peake v. Cantey, 3 McC. Rep. 107, the court said, to make a magistrate liable in a civil action for the consequences of an error in judgment in a matter over which he had jurisdiction, corruption must appear from the grossness of the circumstances, or be proved *aliunde*. [Lining v. Bentham, 2 Bay's Rep. 1; State v. Johnson, Id 385; Little v. Moore, 1 South. Rep. 74.]

We have stated the principles appropriate to the case before us, and cited the decisions by which they are sustained. Without stopping to examine them in detail, or declare our acquiescence in the legal correctness of all of them, we are

satisfied that the ruling of the circuit court cannot be supported. There is nothing in the record to implicate the integrity of purpose of the justice in approving the insolvent surety. In respect to his sufficiency there appears to have been a contrariety of opinion among the witnesses, and the justice, for the purpose of satisfying himself, called upon the surety to declare under oath that he was solvent.

Whether a justice of the peace or other judicial officer, is liable in a civil action for any act done in the performance of his judicial duties, if he does not transcend his jurisdiction, is a question which we will not now consider. But we think it at least certain that he is not liable in such an action to the party aggrieved, for an error of judgment, where it is not shown by direct evidence, or from circumstances which warrant such an inference, that he acted from corrupt or impure motives, or an intention to oppress. The authorities which lay down the most stringent rules against the officer, do not allow recovery upon less proof. The circuit court did not think it indispensable that any impropriety of motive should have been shown, to authorize a verdict for the plaintiff, but that the defendant was liable for the failure to take sufficient surety in the same manner that clerks and sheriffs are; and this, although there is no statute changing the common law liability of justices in such cases. To show that justices of the peace do not occupy the same ground in this respect as clerks, we need only cite the act of 1822, which declares, that if a clerk of the county or circuit court take insufficient surety, upon issuing a writ of error, he shall be liable to an action of trespass on the case in favor of the party aggrieved: *Provided*, That nothing contained in the act shall be so construed as to subject any clerk to a recovery in such action, for taking as security for any writ of error, any person who was generally reputed sufficient for the sum for which he became bound as security, at the time he was so taken. [Clay's Dig. 307, § 7.] Thus we see that this enactment materially modified the law. In refusing to charge that impurity of motive should have been shown, and in charging that the defendant was liable as a clerk would have been, for a similar official act, what we have already said, will indicate the error of the circuit court. Whether

the condition of a bond of a justice of the peace, binds the sureties to answer for the official malversation of their principal, where he acts in a judicial capacity, or whether it was not intended as a security for the performance of his ministerial duties only, we need not inquire. If the bond was lost since the declaration was filed, we can perceive no objection why the plaintiff should not be permitted to prove the loss. It was clearly competent to have alledged a previous loss, and thus excused profert, yet there was no necessity for amending the declaration in this particular.

We have but to add, that the judgment is reversed and the cause remanded.

GAFFNEY v. WILLIAMSON, ADM'R.

1. A claim left with the clerk for the purpose of presentation to the administrator, and retained by him until after the estate is reported insolvent, and then filed with the papers of the insolvent estate, is filed sufficiently within the act of 1843, though he does not indorse the time of filing it, on the note, or transfer it to his docket. Nor can he afterwards be allowed to controvert it, by saying he did not consider it as filed.

Error to the Orphans' Court of Talladega.

THE defendant in error, having reported the estate of his intestate insolvent, and having made his final settlement of the estate, objected to the claim of the plaintiff in error, because it was not filed with the clerk of the court within six months, after the report of insolvency, as required by law; and thereupon the plaintiff introduced the clerk of the court, who deposed, that the attorney of plaintiff placed the claim in controversy, and several others with him, about a year before the report of insolvency was made. That he pre-

sented the claims to the administrator, and they were left with him, for safe keeping, until the estate was declared insolvent. That he informed the creditors, and their attorney, of the report of insolvency, and also of the day set apart for hearing said report, but none of them appeared. The witness on that day placed the claims, including that of the plaintiff, on file amongst the papers of the estate, which showed its insolvency, where they have remained ever since, and did not make any indorsement of any kind upon said claims, nor did he indorse them as filed. He had no recollection of receiving any instructions from the plaintiff, or his attorney to file the claim, in the event the estate was declared insolvent, and not receiving any instructions, did not indorse the claim as filed, when the estate was declared insolvent. That the claims had been presented by him, to the administrator, with others as claims against the estate, and were present, and examined by the administrator, at the time he made his report of insolvency. The administrator filed no objection to the claim in writing, until more than a year after the order of insolvency, and not until the trial of the cause. Upon this testimony the court rejected this claim, which is the matter now assigned as error.

CHILTON and MORGAN, for plaintiff in error.

L. E. PARSONS and S. F. RICE, contra.

ORMOND, J.—In our judgment, this claim must be considered as having been filed in proper time. It appears it was left with the clerk before the estate was reported insolvent, for the purpose of presentation to the administrator, and was by him presented; and upon the estate being declared insolvent, was by the clerk placed among the papers showing the insolvency of the estate. The act of 1843, (Clay's Dig. 194, § 10,) requires the clerk to indorse on the claim the day on which it was filed, and to keep a docket, or list of the claims so filed; but the omission of this duty on the part of the clerk, cannot prejudice any creditor, who deposits his

claim with the clerk, when an estate is declared insolvent. It can make no difference, that this claim was handed to the clerk before the estate was declared insolvent. That he considered it placed in his hands for that purpose, is evident, from the fact that he placed it on file among the papers showing the insolvency of the estate. This unequivocal act, he cannot be allowed to controvert, by saying he did not consider it as filed, or by his omission to indorse the fact upon it, or to transfer it to his docket if he kept one.

From this it results, that the orphans' court erred in its judgment, which must be reversed, and the cause remanded.

MOSS v. McCALL.

1. A deed by husband and wife, reciting that the wife is about to become heiress of certain property, and conveying the property to a trustee for the mutual support of the husband and wife, and directing, that the profits, uses, and issues, should be paid to the husband and wife, "for their joint maintenance, during their natural lives, or to the survivor of them during the term of his, or her natural life," does not exclude the marital rights of the husband, or create a separate estate in the wife—that the entire equitable interest vests in the husband, and his possession completes the legal estate, for the life of himself, or wife, and may be sold under a *fieri facias* against him.

Writ of Error to the Circuit Court of Lowndes.

A WRIT of *fieri facias*, issued from the circuit court against the goods and chattels, &c. of C. B. Easley, which was levied on a male slave named George, about two years of age. Thereupon, the defendant in error interposed a claim, and entered into bond with surety, conditioned to try the right of property pursuant to the statute. The cause was tried by a jury, who returned a verdict for the claimant, and judgment

was rendered thereon. On the trial, the plaintiff proved that the defendant in execution had been in possession of the slave in question about four years previous to the levy. To repel the inference of a title in the defendant, the claimant proved that George was the slave mentioned in the deed of trust hereafter referred to, that he was placed in his possession by the administrator of Julia Mather, deceased, and by him retained for some time; that he was a part of Mrs. Easley's share of the intestate's estate, and that the administrator took her receipt for such share, although he placed the same in the hands of the claimant.

Claimant also offered a deed dated the 25th July, 1842, executed by himself, the defendant in execution, and the wife of the latter. This deed recites that Mrs. Easley "is about to become possessed of certain negro slaves and other property, as heiress of Julia Mather, deceased," and that it is the desire of herself and husband, that that property should not become subject to the present or future debts, contracts and liabilities of the latter, "but that it should be so secured and vested in trustees, that the proceeds thereof might be received for their mutual support." The deed then in consideration of the premises, states that the defendant in execution and his wife "have granted, bargained, sold and released, and by these presents do grant, bargain, sell, release and assign, to the said James McCall forever, all the right, title, claim or demand, legal or equitable, of them, or either of them, may have in and to all and singular, the estate real and personal, now owned, or which may hereafter fall to the portion of the said Mary Ann Easley, as heiress," &c. To have and to hold the same to them and their heirs, during the lifetime of the defendant and wife, and the survivor of them, upon the following uses and trusts, viz: "To pay over the profits, uses and issues of the same to the said Christopher B. Easley and Mary Ann Easley, for their joint maintenance during their natural lives, or to the survivor of them during the time of his or her natural life, not subject to the future or present debts or contracts of the said Christopher B. Easley; and at the death of both Christopher B. Easley and Mary Ann his wife, said property to be distributed in equal parts and proportions, to and between the children of the said

Christopher and Mary Ann ; and in them to be vested in *fee simple*."

Upon this evidence, the circuit court charged the jury, that the defendant had not such an interest in the slave in controversy, as could be levied on and sold under execution ; and thereupon the plaintiff excepted.

J. E. BELSER and N. HARRIS, for the plaintiff in error, insisted that the wife of the defendant in execution has no separate estate, but merely a joint estate with her husband for life, which, when taken in connection with his possession, invests him with an interest which is liable to his debts at law ; and this, although the deed of trust declares that the property shall not be thus chargeable. Such a provision is inoperative. [8 Ala. Rep. 151, *et seq.* ; 4 Dev. Rep. 289 ; 3 Ves. Rep. 166 ; 5 Id. 520 ; 3 Brown's Ch. Rep. 381, 382 ; 5 Mad. Rep. 491 ; 2 Porter's Rep. 463 ; 2 Ala. Rep. 314 ; 7 Id. 32, 592 ; 8 Id. 345.]

N. COOK, for the defendant in error, contended that the husband's possession did not change his interest in the property embraced by the deed—that it was permissive, and might have been reclaimed by the trustee at pleasure. The intention of the deed was for the joint maintenance of husband and wife during their lives, and invests the wife with an interest in all the property, which would be defeated if it could be seized and sold to pay the husband's debts. [19 Wend. Rep. 175 ; 1 Roper on H. & W. 41, 59, 98, 164 ; 6 Munf. Rep. 245 ; 1 Spears' Eq. Rep. 579, 593 ; 2 Kent's Com. 165 ; 6 Har. & Johns. Rep. 460 ; Fonb. Eq. 100, note O.] The present case is distinguishable from *Nelson, Carleton & Co. v. Banks*, 7 Ala. Rep. 32, and *The Bank v. Wilkins*, Id. 589. There, neither of the trustees or the wives held rights in, or powers over the property, independent of the control and enjoyment of the husband.

COLLIER, C. J.—The cases of *Cook v. Kennerly*, and *Bender v. Reynolds*, at this term, are decisive of the present, unless the intention that the profits of the property embraced by the deed should be paid over to the defendant in execu-

tion and his wife, "for their mutual support," and "joint maintenance," distinguish them. In *Fellows, Wadsworth & Co. v. Tann*, by her next friend, et al. 9 Ala. Rep. 999, a father gave to his widowed daughter, "and the heirs of her body, by deed, a female slave, who he provided should be under her control and employment, in the most profitable way for the use and support of herself and "her heirs," during their joint lives; after her death it was directed that the property should be divided "among her heirs." Shortly after the gift, the daughter took possession of the slave, who, together with her increase, have for more than twenty years been treated as the separate property of the daughter and her children; though the daughter married soon after acquiring the possession: *Held*, that the deed invested the daughter and her children *collectively* with interests which the creditors of the husband could not divest through the medium of any *forum*, and as it respected the daughter (his wife), not by sale under execution. But, if the husband acquired an interest in virtue of his marital rights, his creditor must proceed in equity to subject it to his judgment.

In *Spear v. Walkley*, 10 Ala. Rep. 328, the testatrix bequeathed to the husband certain slaves, to be held and worked by him, for the use of his wife and children, but subject in no way to his debts, &c.; and at his death to be equally divided among his children then living, and the issue of such as may be dead, taking together the part that would have fallen to their parent. It was determined that the title to the slaves was vested in the husband for a special purpose, and his control over them was to work them for his wife and children, and he had no estate, even as it respects the wife's interest, that could be sold under execution: that, if the profits of the slaves' labor constituted a fund to be divided between the wife and children, then the wife's share devolved on the husband, and could only be ascertained and separated in equity.

These cases are distinguishable from the one before us, in at least one important particular, viz., in making the children as well as the wife and mother, the present objects of the testator's or donor's bounty; and consequently, are not adverse to the plaintiff.

In *O'Neil, Michaux & Thomas v. Teague and Teague*, 8 Ala. Rep. 345, a father gave certain slaves by deed, in trust for the "benefit" of his married daughter, providing that the daughter and her husband should retain the possession of them, together with their increase during coverture, and the life of the daughter; and if she should die without issue, the slaves were to revert to the donor or his lawful heirs. It was held that the slaves being in possession of the husband, were subject to seizure and sale under an execution against his estate, at least for the period of his life.

But it has been decided that a bequest of a bond and mortgage debt to a married woman, to be delivered up to her *whenever she should demand or require the same*, was a bequest to her *separate use*. The chancellor said, as these securities were to be given up *on her demand*, the husband could not obtain them from the executors *without a demand made by his wife*, which gave her a *dominion* over them, they must be considered as given to her *separate use*. [*Dixon v. Olmius*, 2 Coxe's Rep. 414.] So a legacy to a married woman *for her own use, and at her own disposal*, vests in her a separate estate. [*Prichard v. Ames*, 1 Turn. Ch. Rep. 222.] In *Lee v. Prieaux*, 3 Bro. Ch. Rep. 381, it was held that a legacy to a *feme covert*, with a direction as follows, viz: "her receipt to be a sufficient discharge to the executors," is equivalent with saying, *to her sole and separate use*. In this case the Master of the Rolls said, "the only question now is, whether the words in this will are sufficient to show, that the testator meant to give an absolute power to the wife, independent of the husband, to recover the money." He continues, "the testatrix might probably have inserted these words, 'her receipt should be a sufficient discharge,' in consideration of the petitioner being a married woman, and the party was in that situation, that she could not have been authorized so to do: if these words have not this meaning, she might as well have omitted them." It was therefore concluded, that the testatrix meant that the legatee "should have the power to give a *discharge*, so as to bar her husband." *Darley v. Darley*, 3 Atk. Rep. 399, in which Lord Hardwicke is made to say, that a bequest to the husband for the *livelihood* of his wife is sufficient to show the intention of the

giver that it should be *to her sole and separate use*, was cited by the Master of Rolls. The facts of this case are not stated by the reporter, and he furnishes them from the register, and adds, "such a case, had it been correctly stated in Atkins, might have deserved consideration, but as it stands, is of no authority." [See Adamson v. Armitage, Coop. Ch. Rep. 283; Ex parte Wray, 1 Mad. Rep. 199; Beresford v. Hobson, Id. 376, and note; Elton v. Shepherd, 1 Bro. Ch. Rep. 532; Hoig v. Swiney, 1 Sim. & Stu. Rep. 487; Steel v. Steel, 1 Ired. Eq. Rep. 452.]

It has been frequently said, that courts of equity will not deprive the husband of his wife's property to which he is by law entitled, unless the intention be clear that he was not to derive any benefit from it, and that it should be for the personal use and disposition of his wife. [1 Roper on H. & W. 18, *et seq.*; Williams v. Claiborne, 7 S. & Mar. Rep. 488; Hunt v. Booth, Freem. Ch. Rep. 215.] To create a separate estate in a married woman, where a conveyance is made to a trustee for her use, no technical language is necessary; but it should appear unequivocally on the face of the instrument, that the intention was to exclude the husband from any interference with the property conveyed. [Heathman v. Hall, 3 Ired. Eq. Rep. 414; Thompson, et al. v. McKissick, 3 Hump. Rep. 631.]

The case of Darley v. Darley, as reported by Atkins, perhaps goes farther than any other to support the wife's claim to a separate estate against the creditors of the husband. If a gift to a married woman, for her *livelihood*, invest her with an *exclusive interest*, we cannot see why a gift for her *support* or *maintenance*, should not have the same effect. But the correctness of the report of this case, we have seen is denied in Lee v. Prieaux, and the facts there stated by the Master of the Rolls, perhaps show a case which satisfactorily supports the opinion of the Lord Chancellor, and makes his judgment less questionable than the reporter has shown it to be.

But it is not necessary to consider whether the terms *support* or *maintenance* are either or both sufficiently potent in themselves to constitute a separate estate, where a conveyance is made to the trustee for the wife; for that is not the

case at bar. The deed declares that the intention is so to secure the property, that the proceeds may "be received for their (husband and wife's) mutual support," and directs that the profits, uses and issues of the same be paid to the husband and wife "for their joint maintenance during their natural lives, or to the survivor of them during the time of his or her natural life."

These words do not exclude the control or dominion of the husband, for he may demand and receive all the profits, and his receipt would be a discharge to the trustee; or if it be allowable to pay part of the income to the wife, then as soon as it was paid to her, it would vest in the husband *jure mariti*. This must be so; for there is nothing to indicate that the trust as to the profits, would give a moiety to the separate use of the wife, and exclude the dominion of the husband. The deed then invests the husband and wife with a joint estate to be employed in their *support and maintenance*, and as the trustee has no discretion in expending money for these objects, and the husband is charged with the duty of maintaining or supporting his wife, it would seem in the absence of an express or implied prohibition that the money should come under his control. This being the law applicable to the facts, the cases of *Cook v. Kennerly* and *Bender v. Reynolds*, determine that the entire *equitable interest* vests in the husband, and his possession completes the *legal estate* for the life of himself or wife; and for that length of time it may be sold under a *feri facias* against him.

The cases cited by the counsel for the defendant in error, to show that under a joint conveyance of land to husband and wife, they are seized *per tout* and not *per mi*, that is, they are owners of the whole, and not of the half only, and that the interest of neither of them can be disposed of, without the consent of the other, have no application to the case at bar. The interest acquired by the husband in the real estate of his wife, is altogether different from that which he has in her personalty. But even in the case of a fee simple estate, he may sell on mortgage for his wife's life. *at least*, upon condition that he is the longest liver. [*Motley v. White-*
more, 2 Dev. & Bat. R. 537; *Jackson v. Stevens*, 16 Johns.

R. 110; Jackson v. Carey, Ib. 302; Doe v. Howland, 8 Cow. R. 277; Doe v. Hardenburgh, 5 Hals. R. 42; Barber v. Harris, 19 Wend. R. 617.]

It follows from what has been said, that the ruling of the circuit court cannot be supported—its judgment is therefore reversed, and the cause remanded.

LLOYD v. PACE.

1. An assignee of a note cannot recover of the assignor usurious interest, which in a suit by the assignee against the makers of the note, had been deducted from it, the assignee being a party to the contract, by which the usury was reserved.
2. An assignor is not responsible to to the assignee, for any improper allowance made to the makers of the note, upon their plea, in a suit against them by the assignee.

Error to the Circuit Court of Talladega.

ASSUMPSIT by the plaintiff, against the defendant in error.

From a bill of exceptions, it appears the following facts were in evidence. About the year 1839, the defendant held a note on one Berry Pace, which he transferred to one Simonds, and indulged him upon it one year, on his giving him sixteen per cent. *per annum*; at the end of the year he indorsed the note to plaintiff.

Soon afterwards, Berry became in failing circumstances, and the defendant, to get control of the note of Berry, executed his own note to the plaintiff, with Simonds as surety, and to obtain indulgence another year, sixteen per cent. was added in the note. One Carlisle had become honorably, but not legally bound to see the Berry note paid to Pace.

At the maturity of the note of Pace and Simonds, the plaintiff threatened suit, to prevent which the defendant procured Carlisle, with one Robertson as his surety, to execute notes for the amount of the Berry note, with sixteen per cent. added, for indulgence for a year. These were indorsed by defendant, and handed to the plaintiff, who thereupon surrendered the note executed by the defendant and Simonds. The Berry note was then handed to Carlisle.

Lloyd sued Carlisle and Robertson on the notes, before a justice of the peace. They defended on the plea of usury, and the justice allowed them a discount on the notes, amounting to \$190, being about \$70 beyond the sixteen per cent. added in them. The action was brought to recover the sum thus allowed by the justice, as a discount upon the notes.

The court charged the jury, that if they found that the notes of Carlisle and Robertson were made by an agreement between the plaintiff and defendant, to carry usurious interest, and the former agreed to receive them from the latter, and did receive them pursuant to the agreement, and to obtain delay for another year, then the plaintiff cannot recover of the defendant, any sum which Carlisle, and Robertson, may have had allowed as a defence upon the ground of usury.

That the sum allowed by the justice, to Carlisle and Robertson, is *prima facie* to be considered correct; but if the jury were satisfied that too great a sum was allowed them, the remedy of the plaintiff was to have that judgment reversed and corrected; he could not recover the difference of the defendant. These charges were excepted to. and are now assigned as error.

MORGAN, for plaintiff in error.

L. E. PARSONS, contra.

ORMOND, J.—The plaintiff, as assignee of certain notes, seeks in this action to recover from the defendant as assignor, a portion of the amount which the notes called for, which he failed to recover from the makers. There can be no doubt that the indorsement of a note by the payee, is in law an assertion that the amount it calls for is due from the ma-

ker, and if he succeeds in making a just defence to the recovery, of either the whole or a part, the assignor would be liable to the assignee for the amount.

This question was considered in *Hagerthy v. Bradford*, 9 Ala. 567, and it was there held, that if the assignee gave the assignor notice of the defence set up by the maker, the judgment would be conclusive against him, in an action by the assignee. If notice was not given, it would be *prima facie* evidence only, casting on him the burthen of proving, that the defence set up by the maker was invalid.

The defence which it appears was made to the recovery by the maker, was the plea of usury, which, under our statute, if made out by the proof, would entitle the defendants to a reduction for the amount of the usury, and restrict the recovery to the principal only of the debt. This would doubtless go to the merits, and ordinarily would entitle the assignee to recover of the assignor. But in this case, it appears, the plaintiff was a party to the usurious contract, and that the notes of Carlisle and Robertson, which were made for the purpose of being substituted for the notes which the plaintiff previously held on the defendant and Simonds, were by an agreement between him and the defendant, made to carry interest at the rate of *sixteen per cent.* for the year they had to run to maturity. The usurious contract was made at his instance, and was for his benefit. To permit him after a successful defence by the maker, on the plea of usury, to turn round and recover of the defendant, would be to give effect to the usurious contract—to do that by indirection, which the law forbids to be done directly. As it respects the usurious interest, it is very clear he could not recover of the defendant.

It also appears, that the makers of the notes, when sued by the plaintiff, succeeded in reducing the recovery of the plaintiff \$70, in addition to the amount of usury included in the notes, and if the defendant had been notified of the defence, and required to prosecute the suits, the recovery would have been conclusive against him. But as it appears that this reduction beyond the usury was not a valid defence to

the notes, the assignor was not responsible for the error committed by the justice of the peace. The case was properly left to the jury by the court, upon that hypothesis, and its judgment must be affirmed.

LANDRETH'S ADM'R V. LANDRETH'S DISTRIBUTEES.

1. An administrator having, on his final settlement, filed receipts for money paid the guardian of an infant distributee, and claimed a credit to the amount of the payment, upon the decree in favor of that distributee, which was disallowed by the orphans' court, and its judgment affirmed by this court, cannot afterwards move the orphans' court to have satisfaction entered upon the decree, to the extent of the payment shown by the receipts.

Writ of Error to the Orphans' Court of Cherokee.

In October 1844, the plaintiff made a final settlement of his accounts as administrator of the estate of Thomas Landreth, deceased, with the orphans' court—having previously filed as vouchers with his account, certain receipts for money paid the guardian of the infant distributees of that estate, for which he claimed a credit. These receipts were passed on, and the payments indicated by them adjudged not to be proper credits for the administrator. Thereupon several decrees were rendered in favor of each distributee for the sums due them respectively, which were affirmed by this court on error. In July, 1846, after a notice to the guardian of the distributees, a motion was made to the orphans' court, to have satisfaction entered upon the decrees to the extent of the payments shown by the receipts. This motion was overruled, upon the ground that the subject matter of it had been previously adjudicated, and the payments disallowed.

A. J. WALKER, for the plaintiff in error, insisted that the payments might be allowed after a final judgment on decree, on motion to the court in which it was rendered, that the present case was the first motion that was made for that purpose; and that the disallowance of the receipts upon the settlement of the administration was, not such an adjudication as could be set up in bar of the proceeding. [Carroll, et al. v. Moore, Adm'r, 7 Ala. Rep. 615; Landreth's Adm'r v. Landreth's Distributees, 9 Id. 430.]

L. E. PARSONS, for the defendants in error, insisted, that the writ of error could not be supported, and that there should be several writs against each of the distributees. [4 Stew. & P. Rep. 409; 6 Porter's Rep. 208, 414.] But if this ground be unavailing, he contended that the previous action of the orphans' court, was a sufficient reason for overruling the motion; and if this objection was out of the way, no injury resulted from the ruling of the court, as the evidence of the payment was inadmissible.

COLLIER, C. J.—In Carroll, et al. v. Moore, Adm'r, 7 Ala. Rep. 615, it was held, that an administrator, on the settlement of the estate represented by him, may prove that he has paid the amount due to a distributee, and have satisfaction entered on the record. It was added that "no conceivable benefit could be accomplished by rendering a decree upon which an execution could issue in favor of a distributee, who had been paid off in full. Nor could any injury accrue by the entry of satisfaction, as the distributee to be affected by it, would be a party to the settlement, to controvert the fact." In that case, the entry which destroyed the vitality of the decree, was made simultaneously with its rendition, and was fully sustained by the facts. No question of *res adjudicata* arose, and what was said by the court is to be taken in reference to the case before it.

If payments are made by the administrator, previous to the settlement and order of distribution, he should then attempt to avail himself of them; and if made afterwards in satisfac-

tion of the decree, either in whole or in part, he may move the court to have them entered of record, and the decree thus far declared inoperative. Whether, if previous payments have not been brought into the settlement, it would be permissible for the court to apply them in discharge of the decree, is a question not now presented. We are however of opinion, that as the administrator filed the receipts of the guardian as vouchers, and insisted upon being allowed the benefit of them as credits against the distributees' shares, was overruled, and then presented the question to this court, which sustained the ruling of the orphans' court, no proceeding can there be instituted which raises the same point for decision. The motion to enter satisfaction *pro tanto* upon the sums adjudged to the respective distributees, brings up the precise question, and the rule which maintains the conclusiveness of the judgments, decrees and sentences of a court of competent jurisdiction, upon a matter brought regularly before it, applies with all force. We may add, that the case cited by us maintains the authority of the orphans' court to examine and decide upon the extent of the administrator's indebtedness to the distributees; and the statute entitles the party supposing himself aggrieved to a bill of exceptions and a writ of error.

We do not deem it necessary to consider the objection to the writ of error—the defendants assenting to waive it, as the opinion of this court is in their favor upon the merits of the controversy; and besides, under our very liberal statute, it might, if necessary, be so amended as to make a case for our decision, at least as against one of the distributees. It remains but to add, that the order overruling the motion is affirmed.

McLANE v. MILLER.

1. A defendant, by electing to *recoup* the damages, when sued for a breach of contract, thereby precludes himself from afterwards suing for damages, for the same injury, but may still maintain an action for a trespass, which could not have been *recouped* in the former action.

Error to the Circuit Court of Talladega.

TRESPASS *vi et armis*, by defendant in error, for seizing and carrying away three slaves.

The plaintiff proved the taking of the slaves from his possession, in August, 1842, by the defendant as coroner, and their value. That he was at the time a planter, had a large crop of cotton, and that these hands were engaged in picking it out, when the defendant took them, and it was some weeks before he could procure others in their place, in consequence of which a large quantity of his cotton, and corn, was not picked, or gathered.

The defendant offered evidence tending to prove, that plaintiff had hired the slaves from D. A. Griffin, administrator of J. C. Calhoun—that the plaintiff had executed his notes for the hire to Griffin, as administrator of one King, by mistake, (he being administrator of both estates,) and that the term for which plaintiff had hired them, had not expired by about four months, when the defendant levied on and sold them as coroner, as the property of King. That plaintiff was sued on the notes for the hire, and pleaded the taking of the negroes from his possession, in reduction of the price to be paid, and in fact obtained a reduction of about \$30 on each of the notes. It was further proved, that the proof made by the plaintiff to obtain a reduction, when sued upon the notes, was the same as in this action.

The defendant asked the court to charge, that if the jury believed from the evidence, that the plaintiff in this action,

when sued upon the notes given for the hire, claimed an abatement on account of the seizure of the slaves, before this suit was commenced, he could not recover.

This charge the court refused, and charged the jury, that if the plaintiff had sustained damage in consequence of the trespass complained of, he could recover, but could not recover in this action, the amount allowed by the jury on the notes as an abatement on account of hire. To the charge given, and to the refusal to charge, the plaintiff excepts and now assigns the same as error.

MORGAN, for plaintiff in error.

1. The coroner was justified in taking the negroes under the circumstances, as the property of King, for the administrator of King had treated them as the property of King, and it was the result of his act that damage resulted, and not of the act of the coroner.

2. But the defendant in error elected to have his remedy by way of *recouper* against the administrator of King, and this was an extinguishment of his claim for damages, as well against Griffin as against the coroner. The *recoupment* in the suit upon the notes was with respect to the same cause of action now sought to be enforced against the coroner. [Britton v. Turner, 6 N. Hamp. 495; Batterman v. Pierce, 3 Hill, 175; Rice v. King, 7 Johns. 20; 10 Ala. Rep. 857; see also, 10 Johns, 383.]

3. A recovery in this suit is incompatible with the defendant's right to *recoup* for the same damage in the suit upon the notes for hire.

L. E. PARSONS, contra.

1. The charge given is in precise accordance with the law of this case, as decided by this court when it was here before. [McLane v. Miller, 10 Ala. 856.]

2. The abatement obtained in the suit upon the notes could only extend to the time; and it is evident from the amount allowed by the jury, that nothing more than damages for the trespass has been found in their verdict.

ORMOND, J.—It is very clear, we think, that when a de-

defendant sued for a breach of contract, elects to *recoup* the damages, he would be entitled to recover for the breach of the contract by the plaintiff, he thereby precludes himself from suing to recover damages for the same breach—but we do not understand that this is attempted to be done here. The plaintiff does not contend for the right to recover for the loss of the time of the slaves, in consequence of their having been seized and sold by the defendant as coroner, before the time for which he had hired them had expired. For that loss he has been compensated, by obtaining an abatement, or reduction, when sued upon the notes by the administrator of King. This action is brought to recover damages for injury caused by the trespass, having no connection whatever with the loss of the time of the slaves, for which he has not, and could not have been compensated by any reduction obtained from the administrator of King, upon the suit on the notes for the hire.

This was all that was decided when this case was here at a previous term. [McLane v. Miller, 10 Ala. 856.] That the plaintiff having in a former action, where he was defendant, insisted on a rebatement of the hire which he was to pay for the slaves, and having obtained it, for the reason that his possession was determined by the defendant's act, he is concluded, *so far as that extends*, from again obtaining satisfaction for the same injury. It will be seen by this extract, that the prohibition to recover, extends only to the rebatement of the hire of the slaves, which the plaintiff had *recouped* in the former action, and therefore was not permitted again to insist on. Such is the charge of the court here, by which the jury are confined to the injury resulting from the trespass, independent of, and in addition to the hire. Let the judgment be affirmed.

WALLIS v. RHEA & ROSS.

1. A deed of trust not delivered for registration, or recorded, until thirty-one days after its execution, is void as against judgment creditors, not having actual notice of the deed.

Writ of Error to the Circuit Court of Pickens.

THIS was the trial of the right of property under the statute, and was before this court at a previous term. [10 Ala. Rep. 451.] From a bill of exceptions sealed at the instance of the claimant, it appears that the plaintiffs in execution adduced the original of an *alias fieri facias* issued from the circuit court of Morgan, at their suit, against the goods and chattels, &c. of James Wallis, tested the 25th January, 1842, and returnable to the next term of that court. This *fi. fa.* was received by the sheriff of Pickens in February of the same year, and levied by him on a slave named Miles, the property in question; the claimant objected to its admission, on the ground—1. That it was not a copy certified by the clerk of the circuit court of Morgan, nor a copy prepared by the sheriff who levied it. 2. Because there was no indorsement upon it, that the claim to the property in this case had been interposed. The objection was overruled, and the claimant excepted.

The slave, at the time of the levy, was in the possession of the defendant in execution, and the proof on the part of the plaintiff showed, that *prima facie* he was subject to seizure and sale to satisfy the execution.

The claim set up by the claimant, was under a deed of trust dated the 25th December, 1841, which was deposited with the clerk of the county court of the county in which the grantor resided, for registration, on the 25th January, 1842, thirty-one days after its date, and recorded on the succeeding day. There was no proof that the plaintiff had no-

tice of this deed—and according to its terms the trustee was authorized to execute the trust, by sale of the slave, before the *feri facias* was placed in the sheriff's hands.

Upon this proof, the claimant prayed the court to charge the jury, that the registration of the deed was notice to all the world of its contents, from and after the date of the registration; which charge was refused. Thereupon the court instructed the jury, that if the deed of trust conveying personal property, was not recorded in the county of the maker's residence, or delivered to the clerk for registration, within thirty days after its execution, then it was void as to subsequent purchasers, and *bona fide* creditors, not having actual notice. The claimant excepted to the refusal to charge, and the charge given. A verdict was returned for the plaintiff in error, and judgment was rendered accordingly.

C. E. B. STRODE, for the plaintiff in error, insisted, that the circuit court had erred in both the points ruled against the claimant, and cited Clay's Dig. 256, § 8, 10.

B. F. PORTER and S. H. BRODIE, for the defendant in error, cited 10 Ala. Rep. 451.

COLLIER, C. J.—When this case was here previously, it was said to be allowable to show that the plaintiffs in execution were informed of the existence of the deed under which the claimant set up a right to the slave in question; but if the claimant “failed to prove notice, or an excuse for the failure to record the deed, if any other were available, it would of course be inoperative, and it was the duty of the court so to instruct the jury.” [10 Ala. Rep. 451.]

In *Cummings & Cooper v. McCullough's Adm'x*, 5 Ala. R. 324, it was said by a majority of the court, that the act of 11th January, 1828, which requires a deed such as that before us, to be registered, is a statute intended for the prevention of fraud, and to give registration effect against creditors and purchasers, it is necessary that it should be made within the time prescribed; that a deed subsequently recorded, cannot operate to their prejudice. If, however, “creditors and subsequent purchasers” have notice of the existence of a

deed, it will be operative against them, although it was not registered within the time prescribed. [Smith & Co. v. Zurcher, use, &c. 9 Ala. Rep. 208 ; see also, Daniel v. Sortells and another, Id. 436.]

There was no evidence that the plaintiffs in execution had actual notice of the existence of the deed to the claimant. The registration according to the cases cited was unavailing to exempt the property from liability to the execution. Consequently the ruling of the circuit court was conformable to law, and the judgment is therefore affirmed.

TULLIS v. KIDD.

1. Whether a witness whose opinions are offered in evidence as an expert in any art or science, is competent to testify, is to be determined by the court, either by examining the witness himself, or from the testimony of others.
2. One who is not engaged in the practice of physic, may nevertheless be competent to testify, if he shows that he had studied the science of medicine, and felt competent to express a medical opinion upon a particular disease. The fact that he was not a practising physician would go to his credit.
3. After a witness has been admitted to testify as an expert, evidence cannot be given to the jury of the opinions of other experts in the same science, that the witness was qualified to draw correct conclusions, in the science on which he had been examined ; though such testimony would have been properly offered to the court, to show the competency of the witness.

Error to the Circuit Court of Tuscaloosa.

ASSUMPSIT by the defendant in error, for a false warranty of soundness in the sale of a slave.

Upon the trial, the plaintiff introduced a witness to give a medical opinion, as to the soundness of the slave, who being

examined as to his medical skill, and his right to testify as an expert, stated, that previous to the year 1831, he had attended a course of medical lectures, and had obtained a license from the board of physicians of this State to practise physic, and had practised as a physician for a year, at the end of which time he had abandoned the profession for that of law, and that the law had been his profession for some sixteen years, and still was. The witness stated, that he had continued to read medical works, and had kept up with the improvements of the science, and felt competent to express medical opinions upon the diseases of women. He had examined the woman in this case, and knew the character of her disease. Whereupon, the defendant objected to the reception in evidence, of the testimony of the witness, upon the ground, that he was not an expert in contemplation of law. The court overruled the objection, remarking that it would let it go to the jury under instructions, and the defendant excepted.

After the testimony was completed, and the witness cross-examined by the defendant, who signified his intention to assail the opinions of the witness as an expert in medicine, the plaintiff to sustain his testimony, introduced as a witness a practising physician, and proposed to examine him upon the subject of the competency of the witness in medicine. The defendant objected, upon the ground that he had not introduced any witness to impeach his medical standing, which objection was overruled, and the last witness permitted to testify; to which the defendant excepted. These matters are now assigned as error.

HUNTINGTON, for plaintiff in error.

PORTER & BRODIE, contra.

The allowance of the witness to testify as an expert, and the testimony of the other witness substantiating his evidence, were both proper. [2 Phil. Ev. Notes, 761.]

ORMOND, J.—Whether a witness, whose opinions are of-

ferred to be given in evidence as an expert, in any art, or science, is competent to testify, depends upon his skill in the art or science. This, like all other questions of the competency of witnesses, is determined by the court; and in ascertaining the fact, the court may examine the witness himself, or may ascertain it from the testimony of others. One who exercises an art, or trade, is supposed to be acquainted with it. Thus a practising physician would be presumed, from that circumstance alone, to be acquainted with the cause, and cure of diseases; but it by no means follows, that one who is not in the actual practice of medicine, may not be skilled in the science, so as to be able to give correct opinions, as to the existence, or cause of disease. Clinical practice, is doubtless a most efficient mode of acquiring such knowledge, by enabling the practitioner, from his own observation, to verify the assertions, or theories of others, or to correct errors into which they may have fallen; and it may be, that medical opinions, not brought to this test, are not worthy of much reliance as the basis of the verdict of a jury. But, if one asserts an ability to give correct opinions, upon any art, or science, from an acquaintance with the subject, acquired by observation and study, we cannot perceive on what ground he can be rejected, because he has not been in the actual practice of his profession. This circumstance, as already observed, may deprive his testimony of much weight with the jury, but is no ground for excluding it. So also, among physicians in actual practice, superior skill, greater power, or opportunity for observation, may entitle the opinions of one, to much greater weight than those of another, although both are equally competent, in legal estimation.

It results from what has been said, that the court did not err in permitting the witness to testify, he having stated that he had studied the science of medicine, and felt competent to express a medical opinion upon the diseases of women. A kindred aspect of this question, was discussed by this court, in *Washington v. Cole*, 6 Ala. 212; and see also the case of *Milton v. Rowland*, at the present term, and *The Commonwealth v. Mendurn*, 6 Rand. 709.

But we think the court erred in permitting Dr. Guild to testify to the jury, as to the competency of the witness to ex-

press correct medical opinions. The fact, that the witness who had been permitted to give his opinions, upon questions of medical science, had been a practising lawyer for sixteen years previous, was probably urged to weaken the force of his testimony with the jury, and the object of introducing Dr. Guild, was manifestly to add weight to the opinions of the witness, by superadding the opinion of a well known practitioner, that the witness was qualified, to draw correct conclusions, on such questions. This was evidently invading the province of the jury, whose peculiar duty it was, to determine on the weight, the testimony of the witness was entitled to. Such testimony would have been properly adduced to the court, to establish the competency of the witness, but after he was admitted to testify, the jury were the exclusive judges of the credit he was entitled to.

In *Washington v. Cole*, *supra*, we held, that after a witness had been permitted to testify as a physician, evidence tending to show he was not a physician, but had merely lived in a drug store, was inadmissible testimony to the jury. The reason is precisely the same, where an attempt is made to fortify the claim of a witness to be considered an expert, by the opinions of others. If this were allowed, the verdict of the jury would possibly be rendered, not upon the credit they gave the witness as an expert, from the internal evidence afforded by his testimony to form correct medical opinions, but from the opinion of another witness of his skill and ability. This would be to substitute the witness for the jury, and investing him with the power of drawing conclusions for the jury.

Let the judgment be reversed, and the cause remanded.

JASPER & MACLIN v. HOWARD, TRUSTEE, &c.

1. A bequest to a married woman, "to go to the support of herself and children;" also, "I lend to my daughter, C. D., wife of G. D., the land whereon they now live, with all the household and kitchen furniture which they have in possession; also, one negro woman Winney, one negro girl Ailsie, and one negro Langley, with them and their increase, to enable her to support, school, and clothe her children, during her natural life, and after her death, to be equally divided between her children, to them and their heirs forever," does not give the husband such an estate in the property, as can be subjected to sale at law, for the payment of his debts.

Writ of Error to the Circuit Court of Talladega.

A *feri facias* having issued from the county court of Talladega, at the suit of the plaintiffs in error, against the goods and chattels, &c. of Giles Driver, was levied on a negro woman and child, which were claimed by the defendant, as the trustee of the three children of Celia Driver, and proceedings were instituted to try the right. The cause was submitted to a jury, who returned a verdict for the claimant, and judgment was rendered accordingly. From a bill of exceptions, sealed at the plaintiff's instance, it appears that the will of Luke Howard, which is dated in Hertford county, North Carolina, on the 23d Eay, 1825, was established at the *February term*, 1833, of the court of pleas and quarter sessions for that county. The testator gives, or as he calls it, *lends* to his wife, real and personal property which is specially designated, and after directing how the same shall be disposed of after her death, continues thus, "and also, the part which I have in this instrument hereafter given to Celia Driver, to go to the support of herself and children." "*Item* 3d. I lend to my daughter, Celia Driver, wife of Giles Driver, the land whereon they now live, in Bertie county, with all the household and kitchen furniture which they have in pos-

session; also, one negro woman, Winney, one negro girl Alsie, and one negro, Langley, with them and their increase, to enable her to support, school and clothe her children during her natural life, and after her death to be equally divided between her children, to them and their heirs forever." It was proved that the slave Alsie, now in question, is the same who is mentioned in the third clause of the will, that the persons at whose instance the claim was interposed are the children of Celia and Giles Driver, and that Celia is now, and was, the wife of Giles Driver when the will was made.

It was also proved, that Giles Driver, his wife and children had been in possession of Alsie for eighteen years, and ever since the removal of Giles Driver from North Carolina to this country; and that the will was recorded in the office of the clerk of the county court of Talladega.

The court charged the jury, that if they believed the evidence, they should find for the claimant; and thereupon the plaintiff excepted.

J. T. MORGAN, for the plaintiff in error, insisted, that Celia Driver has a life estate in the property bequeathed to her by her father's will, which may be sold under a *feri facias* against her husband. If the beneficiaries have interests they may be separated. *Fellows, Wadsworth & Co. v. Tann*, 9 Ala. Rep. 999, is distinguishable from the present case. There the gift was to a *feme sole*, and the property being placed under her *entire control*, excluded any participation of right on the part of the husband—it also gave to herself and children a *joint estate* even during her life. Here the bequest is to Mrs. Driver alone, for life, of both the legal and equitable title—her children have a mere equity, which they must enforce in a court in chancery; but the creditors of the husband may seize and sell under execution her interests, which vested in the husband, in virtue of his marital rights. [10 Ala. Rep. 328.]

In the cases cited, the expressed intention of the testator was that the property should go as well to the use of the wife as to the children—that not merely the profits, but the property itself should be devoted to their maintenance. In *Copeland v. McAfee*, decided at June term, 1845, this court

held, that the clauses of the will now in question, invested Mrs. Driver with a life estate in the property, which might be sold to pay the husband's debts. That case is not reported, but the levy in that now before the court was influenced by it.

Abner Howard is the plaintiff in the judgment rendered on the claim of property, though Andrew Howard is the trustee, as the record indicates; for this cause, if none other, the proceedings are erroneous.

L. E. PARSONS, for the defendant in error, contended, that *Fellows, Wadsworth & Co. v. Tann*, 9 Ala. Rep. 999, was directly in point, and decisive of the present case. The will gives the mother an immediate life estate, with present interest in her children; and the husband has nothing that can be sold under an execution against him. If there is a mistake in the judgment entry, it does not prejudice the plaintiffs, and they can't complain of it.

COLLIER, C. J.—In *Spears v. Walkley*, 10 Ala. Rep. 328, certain slaves were given by will to a husband, “to be held and worked by him, for the use of his wife and children, but subject in no way to his debts, contracts or judgments, and at his death to be equally divided among his children, then living, and the issue of such as may be dead, taking together the part that would have fallen to their parent.” This court, in considering whether the husband had such an interest in the slaves as could be reached by his creditors, said, “we are clear he has no such interest in the slaves themselves as is the subject of levy and sale under execution;” that his title was created for a special purpose, that is, to work them for the use of his wife and children; and if the slaves could be taken from his possession at the instance of a creditor, the trust, instead of being carried into effect, would be defeated. *Further*, if the profits from their labor constitutes a fund to be divided between the wife and children, then the wife's share, which devolves upon the husband, can only be separated and ascertained in equity.

In *Fellows, Wadsworth & Co. v. Tann*, 9 Ala. Rep. 999, a father gave to his widowed daughter, “and the heirs of her

body," by deed, a female slave, who he provided should be under her control and employment, in the most profitable way for the use and support of herself, and "her heirs," during their lives; after her death the property was to be divided "among her heirs." In a short time after the gift, the daughter took possession of the slave, who, together with her increase, have for more than twenty years been treated as the separate property of the daughter and her children; though the daughter married very soon after acquiring the possession. It was held, that the deed invested the daughter and her children collectively, with interests which the creditors of the husband could not divest, as it respects the children, through the medium of any *forum*, and as it respects the daughter (his wife) not by levy and sale under execution against his estate; if the husband, in virtue of his marital rights, has an interest in the slave, and her increase, or the profits accruing from their employment, a creditor must proceed in equity to subject it to his judgment. *Further*, that as the daughter became covert, a court of equity may appoint a trustee, in whom the legal title shall be vested, so as to support the purpose of the deed.

The slaves mentioned in the third clause of the will were not vested in Mrs. Driver to be disposed of at pleasure; but during her life she held them in trust to enable her to "support, school and clothe her children." After her death, they were to be distributed equally between the children. In this view of the case, it is difficult to distinguish it from those cited. To assimilate it in principle to the former, it was not necessary that the will should have declared in express terms, that the slaves should be worked for the use of the children, or the mother and children, or that they should not be subject to the husband's debts. In giving them for an object which contemplated that they would be a continual source of profit, the testator must be understood to have directed that they should be profitably employed, and not diverted from the purpose intended, by appropriating them to the payment of the husband's debts. The affirmation of the one intention implies a negative of the other, and is equally potent as if it had been expressed in *totidem verbis*.

Conceding that Mrs. Driver and her children were jointly

Jasper & Maclin v. Howard, Trustee.

interested in the slaves, or the produce of their labor, and still both the cases are in point; for then the mother and children would have interests collectively, which could only be separated, if at all, through the medium of a court of equity. A court of law cannot, under such circumstances, separate the share of a wife from the portion which should be allotted to the children, and devote it to the husband's debts.

If the children did not acquire by the will such an interest in the slaves as would entitle them to maintain an action at law for them, against their mother, it by no means follows, that the father has such a right as may be sold under execution. Mrs. Driver had no rights distinct from her children, and the estate of the latter, as well as the intention of the testator would be materially interfered with, if the slaves were made liable to the husband's debts. The case of *Spears v. Walkley*, shows that he may hold property under a trust for the benefit of his wife and children without its being subject to the execution of his creditors.

In respect to the case of *Copeland v. McAfee*, cited by the plaintiff's counsel, it is true that in one aspect the construction of the will now in question, and the liability of the property bequeathed by the third clause to be levied on to satisfy a judgment against Giles Driver, was presented for decision. But that was a suit in chancery, after a verdict and judgment condemning the property, praying an injunction upon several grounds, and as there was no opinion filed, we are inclined to think that the cause went off upon some objection to the frame of the bill, or its equity. If the question now presented had been considered and adjudicated, it can hardly be doubted but our decision would have been expressed in writing; the more especially as it involved important principles which had not then been decided, and were left open until the cases cited from 9th and 10th Ala. Rep. were determined, one year afterwards.

If the margin of the judgment designates the trustee of the claimants by the name of Abner instead of Andrew Howard, this will be regarded as a clerical misprision, amendable at the costs of the plaintiffs in error; and the amendment is

here made accordingly. This view embraces all the points raised at the argument, and intended to be presented for revision. Our conclusion is, that the judgment must be affirmed.

PLANTERS & MERCHANTS BANK v. THE STATE.

1. A citation issued to a bank, in a proceeding by information, in the nature of a *quo warranto*, on the 21st February, 1843, commanding it to appear at a special term of the court, to be held on Monday, the 28th instant, (the only remaining Monday in the month being the 27th instant,) and the record recites, that a judgment was rendered by default, vacating the charter of the bank, on Monday the 29th of February—Held, that the judgment could not be sustained.

Error to the Circuit Court of Mobile.

THIS was an information in the nature of a *quo warranto*, instituted by the direction of the Governor, in virtue of an act of the Legislature passed 13th February, 1843, to inquire whether the charter of the bank was not forfeited, in consequence of the refusal of the bank to redeem its bills, and obligations, according to the promise therein expressed, on demand.

The information was filed by Percy Walker, Esq., solicitor of the 6th judicial circuit, on the 21st February, 1843, and thereupon the court made an order, that the bank appear, and answer the information, at a special term of the court, to be held on Monday, the 28th instant, at 4 o'clock, P. M. The summons was executed on the President of the bank.

The record then recites, that at a special term of the circuit court of Mobile, held on Monday, the 29th of February,

the State appeared by the solicitor, and the bank failing to appear and plead, or answer the information, a judgment of forfeiture was pronounced against the bank, and its charter annulled. From this judgment the bank now prosecutes this writ.

J. A. CAMPBELL, for plaintiff in error.

1. The entry of judgment was not perfected till January, 1847, a writ of error is not too late.

2. The court was not held at the return of the process. The court being a special one, if not held at that time could not be held at all. A new appointment was necessary.—[8 Porter, 125; Harding v. Merrick, 3 Ala. R. 60; Cullum v. Casey & Co. 1 Ala. Rep. 351; Ulmer v. Austill, 9 Porter, 157.]

3. The *quo warranto* in this case was filed Tuesday, 21st February, 1843—Tuesday following was the 28th February. The return day was the 28th, designating Monday as that day. The court was held on Monday, the 29th. When a writ is made returnable at an uncertain place, the return is void. [Wragg v. Branch Bank, 8 Porter, 195.] So when the time is uncertain, or not conformable to law. [3 Stew. 331.]

The objection in this case does not extend merely to the process. It goes to the appointment of the special term. Was the defendant required to appear Monday the 27th, at 4 P. M., or Tueseday, the 28th, at 4 P. M.? Which shall we reject, the day of the week, or the day of the month? On what principle shall the rejection be made?

4. The record does not contain the facts on which the judgment is founded. The proceeding is in the nature of an inquisition. The object of the act of 13th February, 1843, (Acts, 70,) was "to ascertain judicially," certain facts which it was supposed had occasioned a forfeiture of the charter of the bank. A provision is made for a notice to the bank and for a trial. The proviso to the first section of the act shows that the judgment by default was still to be followed by inquiry. The facts contained in the information should have been supported by proof. This case falls within the principle of the cases, Curry v. Bank of Mobile,

8 Porter, 361, and those involving the same principle decided in this court.

5. The order of the judge does not contain any acknowledgement that evidence had been submitted to him, that the Governor had required the suit to be brought, or that his authority to hold a special term had been called into action by his authority.

6. The information is wholly insufficient to sustain the proceeding. It does not disclose what bills or obligations payment was refused to—nor by whom presentment was made—nor their title to such bills and obligations. This is one of the cases in which so general a form of pleading is disallowed. [The People v. Manhattan Co. 9 Wend. 351; The Commonwealth v. Union Ins. Co. 5 Mass. 230.] This point is fully considered in the case first cited, and the authorities are collected in that opinion.

This shows the propriety of the argument made on the act. The cause of forfeiture is composed of a multiplicity of facts. A single case of failure of payment is not a ground of forfeiture. The ascertainment of these causes of forfeiture is imposed upon the courts. The conclusion of the court, from the evidence, should be stated on the record.

No counsel appeared for the State.

ORMOND, J.—It is quite too clear for argument, that there was no authority in the court to render a judgment by default against the defendant, but at the time it was cited to appear. Two objections are made—First that the time at which the special term was to be held for the trial of the cause, and to which the bank was cited to appear, was wholly uncertain.

The order was made on the 21st February, 1843, which was Tuesday, directing the special term to be held on Monday, the 28th February, instant, and this was the language of the summons issued, and served on the bank. When the term of a court is fixed by law, a mistake in the writ of the time when the court is to be held, will be unimportant, as the language of the writ is, that the defendant be summoned to appear at the next term of the court after the teste

of the writ, and that being ascertained by law, the mistake cannot mislead. But in this case, it was the order of the judge, made on the 21st day of the month, which gave the defendant information of the time when the cause would be heard. There was but one remaining Monday in the month of February after the order was made, which was the 27th day of the month; but the bank was cited to appear on the 28th. The time when the court would be held, was wholly uncertain, unless a citation to appear on one of two specific days, was sufficient notice of the time when the special term of the court was to be held. In *Caskey v. The State*, 6 Ala. R. 193, which was a proceeding before the judge of the county court to vacate the bond of a sheriff, unless he gave new sureties, a citation requiring the sheriff to appear within fifteen days from the date of the citation was held insufficient, because no precise day was set for the adjudication of the matter. That appears to be in principle the same as this case, as there is no sensible distinction between a citation to appear within a certain number of days, or on one of two days—both are uncertain.

But in addition to this objection, the judgment it appears from the record, was rendered by default, because the defendant did not appear on the 29th of February. It is true, it is stated it was on *Monday*, the 29th of February; but if it was conceded that a judgment rendered on Monday, the 27th of February, would be sufficient under an order appointing a special term to be held on Monday, the 28th of February, and a citation to the defendant in accordance with it, by what authority can we reject the statement in the record of the day of the month when the judgment was rendered, and adopt the more uncertain designation of the day of the week, which would equally apply to any Monday of the month? Upon the whole, we feel constrained to say, that there is no sufficient authority shown upon this record, for the rendition of a judgment by default. This renders it unnecessary to consider the other points made in the cause.

Judgment reversed.

REAVIS v. GARNER, ET ALS.

1. The rights of property of a bankrupt, to which the assignee succeeds, are those rights, to which the bankrupt had either a legal, or equitable title, which could be enforced in a court of justice; the right, therefore, which a bankrupt would have, under a fraudulent assignment of all his property, would not pass to his assignee.
2. *Quere*, who is entitled to money in the hands of a trustee of a deed of trust, fraudulent in law, and therefore void as against creditors? Does it belong to the creditors generally who assert a title to it, or only to those who refuse to come in under the commission?

Error to the Court of Chancery for Sumter.

THE bill was filed by the defendants in error, and alledges, that W. & J. Farmer executed a voluntary deed of assignment to the plaintiff in error as trustee, by which deed they conveyed to him all their goods and chattels, and property of every kind, real and personal, in trust for the benefit of their creditors, which the trustee was to convert into money, and discharge certain debts in the order named in the deed, these creditors being divided into eight classes. The residue, the trustee is directed to distribute rateably among the other creditors not provided for, who shall within ninety days accept the provision made for them, and release the grantors from all further liability; and if none of the creditors execute the release, then, after the payment of the debts specifically provided for, the trustee to refund the residue to the grantors.

The bill further charges, that the creditors specifically provided for, have been paid, that none of the other creditors execute the release required of them by the deed, and that there is now in the hands of the trustee the sum of \$3,000.

That the Farmers became voluntary bankrupts, and were so declared the 26th May, 1842. That in the schedule filed by them, of their effects, they set forth their interest in the deed of assignment, made by them to the defendant as trustee. That this interest, was pursuant to an order of the court

sold by the assignee in bankruptcy, and purchased by complainants, who were thereby substituted to all the rights which were vested in the assignee, &c. That the creditors not specially provided for in the deed, are numerous, and unknown to complainants. It is also charged in the bill, that the deed was made with the intent to hinder and delay creditors.

The answer of the trustee, who is the only defendant, admits the making of the deed, and the acceptance of the trust by him, and that he has paid off all the debts specifically provided for, except two of \$1,600 each, which, believing the makers not liable therefor, he has not paid, and admits that he has in his hands \$3,000 of the trust estate. Admits that none of the creditors of the eighth class have released, except two, the validity of which he leaves with the court. Admits the bankruptcy of the Farmers, and the purchase by complainants of their interest in the deed of assignment, but whether the sale was made in virtue of an order of court, or whether the complainants, by their purchase, were substituted to all the right, and title, to the interest sold defendant, does not know, and is unable to answer. He also demurs to the bill for want of equity.

The parties went to a hearing upon bill and answer, and the chancellor considered that the resulting trust to the debtor, rendered the deed fraudulent and void; that although so far as the trustee had paid the creditors under the power conferred on him by the deed, it should not be disturbed, yet that by the purchase the complainants were vested with the right, to all the surplus remaining in the hands of the trustee. From this decree the defendant prosecutes this writ, and assigns for error—

1. The chancellor erred in declaring the deed of assignment fraudulent in law.
2. In declaring that the complainants, by their purchase, acquired the right to set aside the deed.
3. In making a decree, it not appearing that the sale was made by order of the court sitting in bankruptcy.
4. In rendering a decree without the proper parties being made.

REAVIS & BALDWIN, for plaintiff in error.

1. The deed of trust is not fraudulent on its face—the stipulation for the release does not hurt it, though made as a condition to the *cestui que trust's* getting any thing: the provision that, if they do not release, the property shall go to the grantors, only provides what the law, without the words, declares. [Malone & Lyon v. Hamilton, Minor's Rep. 286; 1 Ala. R. 249; Ashurst v. Martin, 9 Porter, 566; 5 Pick. 29.] Here the deed keeps nothing from creditors, and secures nothing to the grantors. [1 Grattan, 280.]

2. The complainants acquired no right to set aside the deed by their purchase, even if the deed was fraudulent. They only bought "the interest of the Farmers in the deed;" which certainly was not money to which the assignee in bankruptcy was entitled, because the deed was fraudulent. They only bought the reversionary or resulting interest, or equity of redemption. What they took by the purchase, was under the deed, not against the deed.

3. The bankrupt law does not (it is submitted) authorize a sale of the bankrupt's choses. However general the terms of the act, they must be taken in subordination to the purposes and character of the assignee's office and duties. [See bankrupt act, § 9.]

4. The proper parties were not before the court. [Story's Eq. Pl. § 72, 81, 86.] Objection can be taken at hearing. [1 Barbour's Pr. 320, 321.]

R. H. SMITH, contra.

1. The deed is fraudulent on its face. [Ashurst v. Martin, 9 Port. 566; Gazzam v. Poyntz, 4 Ala. 374.]

2. By the bankrupt act, the assignee is a trustee of the creditors, and takes as a purchaser for a valuable consideration, and a sale by him passes all his rights to his vendee. [Bankrupt law, § 3; 6 Ala. 343; Ex parte Christy, 3 How. U. S. Rep. 293, 315; Butler and wife v. Merchants' Ins. Co. Mobile, 8 Ala. 150; Carter v. Castleberry, 5 Ala. 277.]

3. It was unnecessary to prove any order of sale. [See bankrupt act.]

4. It was unnecessary to make any other defendant than

the trustee. [Story's Eq. Pl. 145, § 149; Ib. 192, last cl. § 216; Ib. 140, § 143.]

ORMOND, J.—The first question made in the argument, whether this deed is fraudulent in legal estimation, without proof of actual fraud, in consequence of the resulting trust secured to the grantors, in the event the creditors of the eighth class did not execute within ninety days a release to the Farmers, and accept the provision made for them in the deed, has been considered by this court at the present term, in the case of Grimshaw and Brown v. Walker, where it was held that precisely such a provision as this, did render a deed of trust fraudulent, and void. Referring, therefore, to that case, for an exposition of the principles which led us to that conclusion, we proceed to the consideration of the remaining question, which is one of novelty, and not free from difficulty. What did the defendants in error acquire, by their purchase from the assignee in bankruptcy, of the interest of the bankrupts, in this assignment?

The solution of this question, must depend upon the proper construction of the bankrupt law of the United States; and of the rights which the assignee acquired under it. The third section of the act declares, "that all the property, and rights of property, of every name and nature, whether real, personal, or mixed, of every bankrupt, except as is hereinafter provided, who shall by a decree of the proper court be declared to be a bankrupt within this act, shall by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever, and the same shall be vested by force of the same decree, in such assignee, as shall from time to time be appointed by the court for this purpose; and the assignees so appointed, shall be vested with all the rights, titles, powers, and authorities, to sell, manage, and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully, to all intents and purposes, as the same were vested in, or might be exercised by the bankrupt before, or at the time of his bankruptcy, declared as aforesaid."

The evident design of this clause of the law, was to invest

the assignee with all the rights of the bankrupt. The bankruptcy is a civil death, and the assignee succeeds to all his property, and rights of property, and has the same right in it, and the same power over it, that the bankrupt had when the decree in bankruptcy was rendered. It is therefore only necessary to inquire, whether the bankrupt had such an interest in the surplus, under this deed, as he could have transferred and vested in another. If he could not make such a sale, and transfer, it is clear the assignee in bankruptcy could not, as he has the same, and no other, or greater rights under the deed, than the bankrupt.

If this deed had been valid, the grantor would have had a clear right to any surplus which might have remained, after the discharge of the trust; but the deed being fraudulent and void, we are unable to comprehend how he could derive a title to it through the deed. It may be conceded, that as against the trustee, he could have recovered this surplus, no creditor asserting a right to it. But this is not such a right of property as the assignee succeeded to. The rights of property, in the mind of the framers of the bankrupt law, were those to which the bankrupt had either a legal, or an equitable title, which could be enforced in a court of justice; not mere possibilities, which were valuable or worthless, according as creditors enforced, or abstained from enforcing their rights to it. Again, how could such a claim be described in the schedule, which the bankrupt was required to give of his effects. It is described, as appears from the bill, as "their interest in an assignment to Turner Reavis." We have seen that they can assert no interest under this conveyance, as such. The bankrupt law required the assets to be distinctly pointed out, doubtless for the purpose of enabling the assignee to convert them into money, and the necessity for this is more apparent, from the mode generally adopted by the courts of the United States, of directing a sale of the bankrupt's *choses in action*. It is surely contrary to the policy of that law, that under this obscure designation, of an unknown interest, a right should be acquired which cannot be derived from, or enforced under the assignment, but which depends upon the contingency, of no creditor of the bankrupt assert-

ing a right to it. It is contrary to the policy of that law, because in legal estimation such a right is valueless, and in fact every one knows that such bare possibilities have a mere nominal value, and the sale of them adds nothing material to the fund to be distributed. Whilst, therefore, the sale of such interests would not benefit the bankrupt, or the creditors coming in under the commission, all other creditors would be injured, by being deprived of the right of subjecting it to the payment of their debts.

But if this were not the correct interpretation of the bankrupt law, what did the complainants purchase of the assignee?—certainly nothing but the supposed resulting trust under the deed; and under this purchase they cannot assert a title to that which they did not buy.

The assignee, it is urged, is a trustee for the creditors. He is for such as come in under the commission, and prove their debts. As to all other creditors, and it appears from the record in this case there are such, his interest is adverse. No act of his, therefore, can conclude them, from obtaining payment of their debts, from property, which by the fraudulent conduct of the debtor, previous to his bankruptcy, had been separated from his estate. If it were conceded that the assignee could do that, which the bankrupt himself could not do, invalidate the deed, and recover the property from the trustee, he could not, for the reasons already given, convey this right to another.

The question may be asked, what is to become of this money in the hands of the trustee, as the bankrupt's right is gone by the bankruptcy, even if no creditor asserts a right to it. Does it belong to the creditors generally who assert a title to it, or only to those who refused to come in under the commission? We merely put these queries: as they have not been argued, it would be improper to answer them at this time.

We have been compelled to decide this case on principle, and without reference to adjudged cases. If any exist, they have not been brought to our notice, nor have we been able to find any. Our conclusion is, that the decree of the chancellor must be reversed, and the bill be dismissed.

HUDSON AND HUDSON v. MILNER.

1. Two persons, H. and M., being entitled each to enter eighty acres of land, of the same quarter section, made an agreement, by which M. stipulated, that if he did not pay H. \$100 which he owed him, by the time he was ready to enter his portion of the land, that then he would permit H. to enter the entire quarter section, H. paying M. the value, to be ascertained by a reference to the neighbors. Held, that this was a contract for the sale of the pre-emption, and being in violation of the act of Congress of June, 1838, granting pre-emption rights to settlers on the public lands, was void.

Appeal from the County Court of Cherokee.

ASSUMPSIT by the defendant in error, against the plaintiffs in error, to recover the value of an improvement, or right to the entry of land, under an agreement of the following tenor :

Ladiga, May 12, 1840.

It is hereby agreed, between Robert Hudson, and William Milner, that if the foregoing note for one hundred dollars, dated 11th May, 1840, and payable one day after date, for which William Milner is to confess a judgment, at the next county court for Benton county, Ala., is not paid, on or before the time the land office is opened, and the said Hudson is ready to enter his land, before the register, that the said Milner is to suffer the said Hudson to enter the whole quarter on which they both live, and the said Milner will not endeavor to enter himself. And the said Hudson is to pay to the said Milner, whatever the neighbors, to be selected by the parties, say should be paid him, in right and justice, after deducting the said amount of said note for \$100 and interest.

It was proved that Milner, and Hudson, settled upon the same quarter section of land, some time before 1838, with their families; built houses, and resided upon it from their settlement. It was also in evidence, that a judgment was confessed by Milner, as provided for in the agreement, but

that the debt had not been paid. It further appeared, that after the death of Hudson, an arbitration was had between his executors and Milner, who awarded, that the former should pay the latter \$170, after deducting a certain amount. This amount was not paid, nor any note executed for it. It further appeared, that the defendants produced the agreement above set out, and applied to the register to enter the quarter section, which he refused to permit, without the consent of Milner, and Milner, on being applied to, to go to the register, and relinquish his pre-emption, excused himself from going, on account of the sickness of his family.

The defendants then produced the receiver's receipt for the purchase money of the quarter section referred to in the agreement, dated April 10th, 1843, acknowledging to have received it from Robert Hudson.

The court, among many other charges given, and refused, charged the jury, that there was a difference between a promise to pay for improvements on the public land, and a promise to pay for the exercise of a privilege the promissor might have enjoyed, and that if the plaintiff forebore from asserting his right, at the instance of defendant's testator, to a pre-emption, the promise was not void, but founded on a good consideration—and refused to charge that a sale of a pre-emption right, before the patent issued, was void. To which the defendants excepted, and which, with other matters, are now assigned as error.

A. J. WALKER, for plaintiff in error.

The relinquishment of a pre-emption right to the general government, whereby another is enabled to hold a pre-emption on the same land, is by indirection a sale of the pre-emption right. There is no other mode by which the pre-emptor can transfer his pre-emption to another. He cannot sell it by the ordinary bargain, sale and delivery, because the government would not recognize the purchaser, as being invested with the rights of the seller. The act of Congress inhibiting the sale of pre-emption rights, must have had direct reference to such circuitous sales. If it had not, it is unmeaning and aimless. The act of Congress authorizing the assignment of the receiver's receipts rather corroborates, (in-

stead of weakening the idea,) that the design of the national legislature through the series of pre-emption acts, was to inhibit sales of pre-emption rights, by indirection, as was attempted in this case. Such contracts are also against the spirit of the pre-emption laws, and against public policy. The tendency of such contracts is, to subject the unsuspecting and poor occupant of the public lands to the machinations and impositions of speculators, and to divert the public domain from its intended purpose of affording a home for the first *settler* and his family, and of making the pioneer a freeholder, and consequently a better citizen. [4 U. S. Statutes at large, 421, 496, 678; 5 Ib. 251, 382; 2 Pub. Land Laws, instructions and opinions, 601, No. 550; 4 Ala. Rep. 731; 5 Ib. 467.]

ORMOND, J.—The act of Congress of 22d June, 1838, “to grant pre-emption rights to settlers on the public lands,” which merely continued in force other previous acts, having the same object in view, contains the following clause: “Before any person claiming the benefit of this law shall have a patent for the land, which he may claim by having complied with its provisions, he shall make oath before some person authorized by law to administer the same, which oath, with the certificate of the person administering it, shall be filed with the register of the proper land office, where the land is applied for, and by the said register sent to the office of the commissioner of public lands, that he entered upon the land he claims in his own right, and exclusively for his own use and benefit, and that he has not directly, or indirectly, made any agreement, or contract, in any way, or manner, with any person or persons whatever, by which the title which he might acquire from the government of the United States, should enure to the use or benefit of any one except himself, or to convey, or transfer the said lands, or the title which he may acquire to the same, to any other person or persons, at any subsequent time; and if such person, claiming the benefit of this law as aforesaid, shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, forfeit the money which he may have paid for the land, and all right and title to the said land, and any grant or con-

veyance, which he may have made, in pursuance of such agreement, or contract, as aforesaid, shall be void, except in the hands of a purchaser in good faith, for a valuable consideration, without notice." [5 Stat. at large, 251.]

It is impossible to mistake the meaning and intent of this law. It forbids the sale of a pre-emption right, until after the patent has issued; and before one can be obtained, in virtue of a pre-emption right, an affidavit was required, the design of which was to prevent the consummation of any contract for the sale of the land previously, declaring not only the contract void, but the title itself a nullity, except in the hands of a *bona fide* purchaser without notice.

These parties were joint occupants of the same quarter section of land, and by the provisions of the pre-emption law, were entitled each to a patent for eighty acres, on the payment of the government price; and by this contract, Milner agreed, that if he did not pay Hudson a debt of \$100, which he owed him, when the latter was ready to enter his portion of the land, that then he would permit Hudson to enter the whole quarter section, and would not assert his right to one half of it—Hudson paying the value, to be ascertained by a reference to the neighbors. This is evidently a contract for the sale of the *pre-emption*. The mode the parties adopted to carry it into effect, is wholly unimportant. As a contract by Milner to enter the land in his own name, and then convey it to Hudson, would have been void, the same effect must attach upon this contract, by which the same thing was to be accomplished, by his omitting to assert his right to enter the land. The design of the act of Congress was, to secure as far as possible, a permanent home to the settler, and not to confer this boon upon him for the purpose of speculation. But be the policy of the law what it may, its language is clear, and explicit, and it is our imperative duty to enforce it. The contract here relied on for a recovery, being in direct violation of a statute, cannot be enforced.

This renders it unnecessary to consider the other questions raised upon the record, and argued in this court. Let the judgment be reversed, and the cause remanded.

BRANCH BANK AT MOBILE v. HALLETT & WALKER.

1. A notice of the dishonor of a note, given to the executor of an indorser, before he has qualified as such, is not such a presentment, as will take the case out of the statute of non-claim.

Error to the Circuit Court of Mobile.

ASSUMPSIT by the plaintiff in error, against the defendants in error, as executors of Joshua Kennedy, indorser of a promissory note.

The facts of this case, are the same as in the preceding case, of Hallett & Walker v. The Branch Bank at Mobile, except, that when the notice was given to Hallett, of the dishonor of the note, he had not qualified as the executor of Kennedy, and the court charged, this was not evidence of a presentment of the claim under the statute. This is the matter now assigned as error.

CAMPBELL & LESESNE, for plaintiff in error.

The question involved in this case is, whether the presentment of a claim to an executor, with the powers conferred by the will in this case, before such executor qualifies, is a sufficient presentment within the statute of non-claim.

1. An executor derives his authority from the will—the probate is a mere confirmation of that authority. From the moment of the testator's death, he is clothed with all the decedent's authority, save in the respects excepted by statute. The appointment of an executor is to place him in the stead of the testator, and he may at once, before proof of the will, enter upon the realty and take possession of his personalty. He may, at common law, do almost any act incident to his office, except only those relating to suits. He can pay debts and legacies, sell the estate and give releases, and although he afterwards die, these acts will be good. [Mathews on Ex'rs, Law Lib. vol 9, t. p. 32, m. p. 76.]

2. The subsequent qualification relates back to the time of the testator's death, and ratifies all that the executor does. It is an affirmation on the part of the executor, that he accepted the trust at that time, and sustains a suit commenced either by or against him. [Mathews on Ex'rs, Law Lib. m. p. 77; Toller Ex. 165.] And the probate, although obtained after action brought, shall, when produced, relate back to the death of the testator, and so perfect and consummate his authority from that time, (1 Wms. Ex'rs, 163-4) and so *mutatis mutandis* of suits against him. [Ib. 165.] If, then, he can be sued before probate, and either his acting as executor without probate, or his subsequent probate, will be a sufficient replication to a plea of *ne unques*, it is difficult to conceive on what principle a presentation to him, within the time required by statute, but before qualification, can be held insufficient. If he had never qualified or acted, a different question would have been presented.

STEWART, contra.

ORMOND, J.—This case does not come within the case just decided, where the parties to this suit are reversed, *supra*. That decision proceeds upon the hypothesis, that the personal representative, when he received notice of the dishonor of the note, and was informed the estate was looked to for payment, could have paid the note; or in other words, that it was in law a presentment to him of the claim for payment.

But an executor, in this State, does not derive his authority to act from the will, but by the performance of those acts, which are made a prerequisite to his obtaining letters testamentary—by taking the oath required by law, executing bond, &c. Until these conditions are performed, he can do no act as executor, unless it be such as is merely conservatory of the estate. It is very clear he can do no act, which would charge the estate, and it follows necessarily, that he cannot be the means, or instrument, through whom a charge against the estate is predicated. If he could not pay the debt on presentation, the presentment to him for payment must be a nugatory act. This point was determined in *Cleveland v.*

Chandler, 3 Stewart, 489, where it was held, that an executor could do no act which would charge the estate, before his qualification as such under the statute. We are all of the opinion, that the notice in this case was not a presentment to the executor, within the meaning of the statute of non-claim.

Let the judgment be affirmed.

HAWKINS v. MAY.

1. A deed of trust, or mortgage, executed as an indemnity to the sureties of an executor, will be upheld at law, whilst the liability continues. *Quere*—would not a court of equity, upon a proper indemnity being executed, direct a sale of the trust property, at the instance of a creditor of the grantor.
2. The possessory interest of a grantor in a deed of trust, which may be sold under execution, is a certain, ascertained possession, for a definite period.
3. One of two co-sureties may interpose a claim under the statute, for the benefit of both, and if no objection is taken in the primary court, it cannot be made here.

Error to the Circuit Court of Sumter.

TRIAL of the right of property, in which the plaintiff in error was claimant.

The plaintiff levied an execution on certain slaves in the possession of Mahala May, the defendant in execution, and on the trial gave in evidence the will of James B. May, dated 22d September, 1838, as follows: "It is my wish and desire, that all my just debts be paid. It is my wish that my property should be kept together on my plantation, under the superintendence of an overseer. It is my wish, that my wife, Mahala May, should have the use of the proceeds

of my property, for the support and education of my children, and the support of herself. It is my wish, if my wife should never marry, that she should keep the property together, and as each child becomes of age, or marries, to give to each child his, or her equal part; and I do hereby appoint my beloved wife, Mahala May, and my brother, Philip May, my true and lawful executors of this my last will.

The claimant proved, and gave in evidence, a deed, executed by Mrs. May, in which was recited her intended marriage with one Jesse F. Roan—the will of her late husband that the claimant and one Anson Norwood, the parties of the second part, were her sureties, as executrix, and were unwilling to remain longer bound without being secured. In consideration whereof, with the consent of her intended husband, she covenants with them, that immediately after the solemnization of the marriage, she will execute a deed of mortgage for all her right, title, and interest, in and to, the estate of her husband, which may accrue to her, with power whenever they think proper, to take, sell, and dispose of the same, at thirty days public notice for cash; to retain the same so long as may be necessary for their indemnity, and to hold the same so long as their liability may continue, and to raise and retain such sums, and all expenses attending the same, as on final settlement of her said trust, they may be made liable for, or compelled to pay for her, or her husband's acts, &c.

After marriage, the husband and wife executed a deed, in which, after reciting the previous deed, and its provisions, they conveyed by mortgage to the claimant, and his co-surety, all their interest in the estate of the deceased.

The claimant then proved, that a distribution of the slaves of the estate was made among the distributees, and those levied on decreed to Roan and his wife. That the orphans' court determined, that it had not jurisdiction to execute the trusts of the will, and dismissed the cause. That thereupon Roan and wife filed a bill in chancery for the settlement of their administration, which bill is still pending. That the claimant by reason of his liability as surety, has paid about \$80, and since the levy, a judgment has been ob-

tained against him for \$106, which has been suspended, by an arrangement with the guardian of a legatee.

Upon these facts, the court decided, that upon this deed there was a continuing law day, and such being the case, the claimant could not maintain his right at law, but must resort to equity.

The court refused to charge, that under the deed the grantees had the right to take possession of the property at any time, and having that right, might interpose the claim, and charged, that until a liability was fixed upon him, he had no right to the possession. And also refused to charge, that if the claimant had paid \$80 at the time he put in his claim, he had a right to the possession of the property, and charged, that if the defendant in execution was in possession at the time of the levy, she had such an interest as was subject to levy and sale. To all which the claimant excepted, and which he now assigns as error.

R. H. SMITH, for the plaintiff in error.

1. The claimants had a legal title to the property, which they might protect by trial of the right, and the defendant in execution had no interest subject to levy. [P. & M. Bank v. Willis & Co. 5 Ala. 770; Perkins & Elliott v. Mayfield, 5 Porter, 191-2.]

2. No question was made below as to the right of Hawkins to claim without joining his co-trustee, and this court cannot therefore adjudicate that question.

3. The issue is, whether the slaves were liable to the execution, and it is immaterial whether the title is in claimant solely or not; he might, on this claim, show title in himself and his co-trustee. It is not setting up an outstanding title in a third person.

F. S. LYON, contra.

1. Hawkins could not, in his own name maintain a claim against the slaves in controversy, because the deed relied upon, conveyed the title to Hawkins and Norwood, as sureties of Mahala May, as executrix, and for this reason the plaintiff in execution had a right to recover as against Hawkins.

2. The deed to Hawkins and Norwood, was made to secure them against a contingent liability—such default as the executrix might commit—and is not therefore to be favored as against a *bona fide* creditor, and claimant could not sustain his claim except to the extent of any liability incurred at the time of the claim. [See Perkins & Elliott v. Mayfield, 5 Porter, 182.]

3. If the deed to Hawkins and Norwood was valid, the plaintiffs had a right to subject to their execution the interest of Mrs. May, who was a mortgagor in possession. [McGregor & Darling v. Hall, 3 S. & P. 397.]

4. The plaintiff in execution had a right to subject such interest as Mrs. May had in the slaves, leaving the mortgagees to protect themselves by a resort to a court of equity.

ORMOND, J.—The case of Perkins and Elliott v. Mayfield, 5 Porter, 191, is a conclusive authority, that a deed made *bona fide*, in trust to secure a contingent liability, will be upheld against a creditor of the grantor, and that whilst the liability is continuing, and undetermined, the property conveyed in trust, cannot be sold for the debts of the grantor. This case is precisely similar. The deed here is to indemnify the claimant, and his co-surety against loss, as the sureties of the defendant in execution, upon her official bond as executrix, and the case cited is fully in point, it having been shown that the liability is still continuing. Under the equity of the statute, which authorizes a creditor to pay the secured debt, and have the benefit of a trust provided for its payment, the creditor in such a case as the present, it would seem, should be permitted, upon indemnifying the surety against loss, to be permitted to sell the property conveyed for his security. This, it is true, a court of law could not do, but a court of equity has ample power to cause such an indemnity to be executed, and without such a power existing somewhere, deeds of this description must be liable to great abuse. But conceding this power to a court of equity, it is certain, that at law, the deed, if *bona fide*, must be upheld against the claim of a creditor.

In this case however, it appears there was an actual default,

Hawkins v. May.

and that the surety has been compelled to pay a sum of money on account of his suretyship, and according to all the authorities to be found in our books, he had the right to the possession of the property under the deed, to sell for his reimbursement. Having the right under the deed, to take possession at their discretion, and sell, they cannot be deprived of the exercise of this right, by [the levy of an execution; but may, after the levy, assert their right, and put an end to the possession acquired by the sheriff. [Magee v. Carpenter, 4 Ala. Rep. 469; P. & M. Bank v. Willis & Co. 5 Id. 785.]

The possessory interest of the grantor, which may be sold under execution, against the will of the grantee, is a certain, ascertained possession, for a definite period, and not a permissive possession, such as this, which may be terminated at the pleasure of the grantee, whenever he considers it necessary for his security, and which is in fact terminated by the interposition of a claim.

The question is raised in this court, that both the sureties for whose indemnity the deed was executed, should have interposed the claim. If the objection had been made in the court below, it would doubtless have been in the power of the court to permit the other surety to join in the prosecution of the claim. But as the interest of the sureties in this deed was joint, we can perceive no reason why one should not be permitted to prosecute the claim for both, at all events if it is not objected to. [McGrew v. Hart, 1 Porter's Rep. 175.]

Let the judgment be reversed and the cause remanded.

McKINSTRY v. CONLY.

1. When the evidences of debt are delivered up to the debtor, upon a contract importing on its face a sale of personal property, and the debt admitted to be satisfied, nothing short of the clearest, and most convincing proof, that a remedy existed for its recovery, would suffice to convert such a contract into a mortgage.
2. A written contract, by which one bound himself to "re-sell" certain slaves, which he had purchased, and for which he had received a bill of sale, cannot be contradicted by parol evidence, unless the contract was obtained by fraud, or entered into by mistake, or surprise.
3. An allegation in a bill, that by the term "re-sell," the parties meant *re-convey*, is not sufficient to authorize the introduction of parol proof, contradicting the written instrument.
4. A court of equity will relieve against a sale of the equity of redemption to the mortgagee, for a grossly inadequate price.

Error to the Chancery Court of Mobile.

THE bill was filed by the plaintiff in error, to redeem certain slaves upon an alledged mortgage, existing between the defendant in error, and one Giles M. Mallett, a bankrupt, whose interest the plaintiff asserts by a purchase, and conveyance from the assignee in bankruptcy.

The bill charges, that Mallett, being indebted to Conly in the sum of \$2,636, for several sums of money before the 28th May, 1839, advanced to him, in order to pay a part of the debt, and to secure the residue, on that day executed to Conly, an instrument which on its face purports to be a bill of sale of four slaves, viz., John, Elsey, a black girl, Elsey, a mulatto, and Sally, a mulatto, but which was in fact designed, and understood by the parties to be, except as to the girl Sally, a mortgage on the slaves, to secure the payment of the sum of \$1,876, part of the debt, and to give the instrument the effect of a mortgage, as to the other three slaves, Conly at the same time executed to Mallett, an instrument in writing, whereby he promised that upon payment being made to

him of the sum of \$1,876, with interest, he would *re-sell*, meaning thereby *re-convey*, the said three slaves.

The bill contains the necessary allegations of the plaintiff's right to redeem, prays a foreclosure of the mortgage, an account, &c.

Appended to the bill are the following exhibits:

Received from M. J. Conly, three notes made by me, and payable to him, one for \$760, one for \$640, one for \$300, and \$936 in cash, in full payment for four slaves (describing them). The three first named, are the same mortgaged to M. J. Conly, under date 27th April, 1839. The title to the above named slaves, I hereby warrant, &c. May 28, 1839.

G. M. MALLETT.

I, Morris J. Conly, do hereby promise to Giles M. Mallett, that upon payment being made to me of the sum of \$1,876, with lawful interest from date, I will re-sell to him, if they are in my possession, three of the negro slaves, namely, John, Elsey a black, and Elsey a mulatto girl, more fully described in book, &c. in the clerk's office of Mobile county.

M. J. CONLY.

Mobile, May 28, 1839.

Conly answered the bill, and denied that the defeasance was intended as a mortgage, but was designed to be, what its language imports, a right to re-purchase. That there had previously been a mortgage executed by Mallett to him, on three of the slaves, and that upon the execution of the contract set out in the bill, he gave up all the evidences of debt he had against Mallett, and released him from liability. That then Mallett executed a bill of sale for the slaves, and took from him a power to re-purchase. That the girl Sally never was in his possession, being mortgaged at the time to one Anderson, and that he has sold the mulatto girl Elsey to one Thorington for \$550, &c.

The depositions of Mallett and wife were taken, who substantially sustain the allegations of the bill, that the intention of the parties was, that the transaction should have the effect of a mortgage, &c.

The chancellor considered that the proof was inadmissible, as it went directly to contradict the written agreement of the

parties, and dismissed the bill. This is now assigned as error.

W. G. JONES, for plaintiff in error.

DARGAN, contra.

ORMOND, J.—This is an application to redeem certain slaves, in virtue of an alledged mortgage, which, though in the form of an absolute sale, with a right to re-purchase, is alledged in the bill to have been intended to operate as a mortgage.

The allegations of the bill are substantially proved by the depositions of Mallett and his wife; the former having been previously the owner of the property, and all his rights having been transferred to the plaintiff, on his becoming a bankrupt, by the assignee in bankruptcy. On the other hand, the subscribing witness to the bill of sale, states, that he supposed it was an absolute sale, with a right to re-purchase, and heard nothing to the contrary between the parties; and the internal evidence arising out of the transaction itself, and the admitted facts, strongly corroborate the assertion of the defendant in his answer—that the written contract discloses the true character of the agreement of the parties.

It appears there had been a previous mortgage on these slaves, executed by Mallett to the defendant, which was abandoned by the parties, and the contract executed, which it is now insisted was intended to operate as a mortgage. The question here naturally presents itself, why was this change made. If a mortgage was intended, why abandon the one already executed, and substitute another in its stead, importing on its face an entirely different contract, and which could only be established to mean something else, by extrinsic parol proof, of which no one had any knowledge, but the parties themselves.

If it is difficult to suppose Mallett would thus have put himself in the power of Conly it is not the less difficult of solution, why the latter should have delivered up to Mallett all his evidences of debt, if in truth the transaction was intended to be a mortgage. It is a necessary ingredient in a mortgage, that the mortgagee should have a remedy for his debt

McKinstry v. Conly.

against the debtor, the mortgage itself being a mere security for the debt. It is true the mere delivery to Mallett of the evidence of the debt, would not extinguish the debt, if it was not the intention of the parties to do so. But the natural, as well as the legal inference would be, that when the evidence of the debt was delivered up, the debt itself was cancelled. In this case, the supposed mortgagee not only delivered to Mallett his evidence of the debt, but the fact was by him admitted in writing, by his accepting Mallett's receipt of them, as payment for the slaves, and against this written testimony, he had no evidence whatever, either verbal or written, that the debt was not paid. It certainly devolved on the party insisting on this contract as a mortgage, to explain these apparent incongruities; yet no explanation whatever is given in the bill, or by the testimony. In the case of Conway v. Alexander, 7 Cranch, 218, it is considered by Chief Justice Marshall as a controlling fact in cases of this kind, that no evidence of debt is preserved by the supposed mortgagee. When, as in this case, the evidence of debt has been delivered up, and the debt itself admitted to be satisfied, nothing short of the clearest, and most convincing proof, that the party had a remedy, would suffice to convert such a contract into a mortgage. If this contract is *bona fide*, it is in the highest degree improbable, that Conly should have delivered up the evidences of his debt, and still subject himself to the disabilities of a mortgagee, thereby putting it in the power of Mallett, to convert the contract into a mortgage, or rely upon it as a sale with a power of re-purchase, at his pleasure.

There is another aspect of this case, which is entirely decisive. Since the decision of this court in *Hudson v. Isbell*, 5 S. & P. 67, it has been settled as the law of this court, that a contract absolute on its face, may be shown to have been intended by the parties to operate as a mortgage, and when this is satisfactorily made to appear, effect will be given to the real contract of the parties. This, whether wise or unwise, is now firmly established as an exception to the general rule, that the written contract of the parties, cannot be added to, or contradicted by parol.

The purpose of this bill is not to correct a mistake, and to

have a contract reformed, so as to make it speak the true meaning of the parties. It is not alledged, that the contract was put in its present shape, by the fraudulent contrivance of the defendant, or that by mistake of the draughtsman, it was put in its present form. The language of the bill, is, "to give the said instrument the operation of a mortgage, the said Morris J. Conly, at the same time executed to the said Giles M. Mallett an instrument in writing, (describing it,) whereby he promised, he would re-sell, meaning *re-convey*, to the said Giles M. Mallett, the three last mentioned slaves." The plain import of these allegations, is, that the term re-sell, is not in this instrument to be understood in its true sense, but in another entirely different. This cannot be tolerated, as it would effectually annul the rule of evidence above referred to. Conditional contracts, are as much within the protection of the rule, as absolute ones. To hold otherwise, would be to deprive all conditional contracts of the faith now reposed in them. It is true, as already stated, that this, and other courts have held, that an absolute conveyance may be shown by parol evidence, to have been intended as a security merely for the payment of a debt, upon the ground that it does not contradict the written contract, but gives the effect to it the parties designed it should have, and prevents the commission of a fraud. It may perhaps be doubted, whether even this is not an invasion of this salutary rule. But it has never been supposed, that when parties have entered into a written conditional contract, it may be shown by parol proof, an entirely different contract was intended by the parties, without an allegation of fraud, mistake, or surprise. If this can be permitted, we can see no obstacle to an averment, that \$1,000 in a bond, or note, means \$100, or that a mortgage is an absolute sale.

This question was fully considered by this court, in *Hair v. La Brouse*, 10 Ala. 554, and previously in *Paysant v. Ware & Barringer*, 1 Id. 164; see also *Hunt v. Rousmaniere*, 1 Peters, 13, and *Lord Irnham v. Child*, 3 Bro. C. C. 92.

It has also been urged in argument, that there was once indisputably a mortgage between these parties, upon these slaves, which was succeeded by this contract, and that it is a maxim of equity, once a mortgage, always a mortgage. This

rule amounts to no more than this, that the court will protect the mortgagor, against contracts entered into with the mortgagee, impairing, or destroying the equity of redemption. From the relative condition of the two parties, it looks with jealousy on all such contracts. It will not tolerate a clause in the mortgage, that the mortgagor shall not redeem, as that is an inseparable incident of the contract; and will relieve against a sale of the equity of redemption for a grossly inadequate price, from the power which the mortgagee has over the mortgagor. [1 Pow. on Mort. 117; Newcomb v. Bonham, 1 Vernon, 8; Wilson v. Troup, 7 Johns. C. 40; Clark v. Henry, 2 Cow. 331; Seton v. Slade, 7 Vesey, 273; Hutchinson's Heirs v. The Bank U. S. 7 Ala. 443.] It has not, however, ever been held, that the mortgagee could not deal with the mortgagor, and make a fair purchase of the equity of redemption, and that such a sale, made for an adequate consideration, would not be supported.

But the entire argument is entirely out of place in this case. The object of the bill, is not to have the benefit of the original mortgage. It is not so much as named in the bill, and is only brought to light by the answer. Nor was the purchase of the plaintiff, of the bankrupt's interest, predicated upon it, but upon the instrument authorizing the repurchase of the slaves. There is no ground, therefore, for the application of the maxim, as the facts upon which it would have to rest, are not put in issue by the bill.

Our conclusion upon the entire case, is, that the decree of the chancellor dismissing the bill must be affirmed.

EASLY, ADM'R OF BELL, v. BOYD.

1. A judgment cannot be rendered against an administrator in detinue, where the suit has been revived against him, unless the thing sued for was in the hands of his intestate at the time of the suit brought, or has since come to the possession of the personal representative, and held by him as assets of the estate.

Error to the Circuit Court of Talladega.

DETINUE by the defendant in error, against the intestate of the plaintiff in error, to recover a number of slaves.

Upon the trial, as appears from a bill of exceptions, the plaintiff, to prove the execution of a mortgage by the defendant, introduced one of the subscribing witnesses thereto, who stated that his signature was genuine, and that the instrument was either subscribed in his presence, or acknowledged by Bell to be his signature at the time he subscribed his name. The plaintiff then read to the jury the deed referred to by the witness, by which Bell conveyed to the defendant, and Thornton Taliaferro, a tract of land, and the slaves sued for, with a condition, reciting that he had drawn a bill of exchange for \$7,000, payable at the Branch Bank at Montgomery, and accepted by Edward Hanrick, and that if he failed to pay the bill when it became due, then the grantees were authorized, and empowered, to take the land, and negroes, and expose them to sale in the city of Montgomery, giving sixty days notice, &c., and appropriate the proceeds to the payment of the bill.

The plaintiff proved, that the bill described in the deed was discounted by the bank, and paid on the 10th June, 1845, by Hugh P. Caffey, and the plaintiff. The defendant objected to this evidence, because there had been no notice to produce the bill of exchange, but the court overruled the objection.

The defendant then offered in evidence the record of a

suit, to show that Pharr & Beck had instituted a suit in detinue, against Bell, for these slaves before this suit was commenced. That in the lifetime of Bell, they recovered judgment against him. That Bell had given bond with sureties to abide the judgment in the suit, which was pending when this suit was commenced, and that after judgment in favor Pharr & Beck, and during the life of Bell, they were delivered up pursuant to the bond, and that the slaves had never come to the hands of Easly, as the administrator of Bell.

The court charged the jury, that if Bell executed the mortgage, and had failed to pay the bill of exchange, and was in possession of the slaves at the commencement of the suit, they should find for the plaintiff.

The defendant asked the court to charge, that if the slaves had never been in the possession of Easly, they should find for the defendant; which charges the court refused to give. The defendant excepted to the charge given, and to the refusal to charge, and assigns all the matters arising out of the bill of exceptions for error.

L. E. PARSONS, for plaintiff in error.

T. D. CLARKE and WOODWARD, contra.

ORMOND, J.—There is no entry of record of the revival of this suit against the plaintiff in error, nor is there any question raised here whether such a suit as this can be revived under our statute. We shall therefore not enter upon the consideration of that question, but confine ourselves to the examination of the question, whether, under the process, any judgment could be had against the administrator in this case.

The question of the liability of an executor to be sued in detinue, came before this court in *Brewer v. Story's Ex'r*, 10 Ala. 961, and was there fully considered. It was held that the action could be brought against him, in his representative character, upon an allegation that the chattel sued for was in the possession of the testator, and after his death came to the possession of the executor, who detained it as such. From this it seems to follow conclusively, that if an action of detinue can be revived against the personal representative

of the defendant, no judgment can be rendered against him, unless the chattel sued for, at the time of the suit brought, was in the hands of the deceased defendant, has since come to the possession of his personal representative, and is held by him as part of the personal assets of the estate. In this case it is shown, that the slaves sued for never came to the possession of the administrator, but were taken from his intestate previous to his death, in satisfaction of a bond by which they had been replevied. The refusal of the court therefore, to charge that no recovery could be had against the administrator, unless the slaves sued for had come to his possession, was clearly erroneous. Whatever other remedy the plaintiff may have against the personal representative, it is clear he cannot maintain detinue to recover a chattel which never came to his possession.

It is urged by the counsel for the defendant in error, that the act of 1830, (Clay's Dig. 317,) requires the revival of the action of detinue against the personal representative, as otherwise the plaintiff would lose the security afforded him by the replevin bond of the deceased. The design of the Legislature in the act referred to, was doubtless to make the remedy by detinue more effectual, and to insure the production of the property, to answer the plaintiff's judgment, in the event of his recovery, by requiring the defendant to give security for its production. But we are unable to perceive how this should authorize an action of detinue to be instituted, or maintained, against the administrator. This was clearly not within the contemplation of the legislature at the time of the passage of the act, and if the death of the defendant has disabled them from proceeding against the sureties on the bond it is no reason for permitting a judgment to be rendered against the personal representative for the specific property, which he never had in possession.

As this point is decisive of the case, it is unnecessary to consider the other questions made in the argument. Judgment reversed and cause remanded.

REPORTS
OF
CASES ARGUED AND DETERMINED
AT THE
JANUARY TERM, 1848.

HILL v. BARGE.

1. When a will is contested, either in chancery, or in the orphans' court, the heir is entitled to an issue of *devisavit vel non*, if he demands it.
2. When a will offered for probate is in the hand-writing of the person to benefitted by it, before the will can be admitted to probate, it must be satisfactorily established, that the testator knew its contents. If, in addition to the will being written by the beneficiary, other suspicious circumstances exist, such as extreme debility of the testator, and great confidence reposed by him in the writer, the demand of the law for proof of knowledge of the contents of the will, will be increased.
3. A will, to be attested in the presence of the testator, must be witnessed within his view. It is not necessary to prove that he actually saw the witnesses attest the will; it is sufficient if, from their relative position, he, could see them.

Error to the Chancery Court of Butler.

THE bill was filed by Reuben Hill, the plaintiff in error, to set aside a will purported to be executed by Josiah Hill,

brother of complainant. The bill alledges that the deceased was of unsound mind, and memory, for a considerable time previous to his death. That he was exceedingly weak in body and mind, and was influenced by John Barge to make the will, which was executed a few days before his death, he being then incompetent to make a disposition of his property. That complainant, his sister Prudence Watts, and Elizabeth, wife of John Barge, are the next of kin of the deceased, and that the will was admitted to probate by the orphans' court of Butler, on the 21st September, 1840, without notice to any of the next of kin. That Barge has obtained letters testamentary as sole executor, and has gone into possession of the estate.

The prayer of the bill is, that the will be set aside, and the estate distributed according to law.

The will, as admitted to probate, is made an exhibit, and is as follows:

I, Josiah Hill, of the county and State above written, being infirm of body, but of perfect mind, and sound memory, &c. &c., do make and declare this to be my last will and testament:

First—My worldly estate I give and devise as follows, viz: I give to my beloved sister, Prudence Watts, the east half of all my lands, in Sec. 18, T. 11, R. 12; also the west half of the North E. quarter of Sec. 19, T. 11, R. 12; also, my negro man Perry.

I give to my beloved sister, Elizabeth W. Barge, the west half of all my lands in Sec. 18, T. 11, R. 12; also the N. W. qr. of Sec. 19, T. 11, R. 12, containing 160 acres; also, the east half of the N. W. qr. Sec. 19, T. 11, R. 12; also, the following slaves, my negro man Richmond, his wife Fanny, and her nine children; my negro man Moses, and his sister Kate, and her six children, also my pleasure carriage and harness, my wagon and gear, my stock of horses and mules, cattle, hogs and sheep, my present growing crop of cotton, corn and fodder, together with my household furniture of every kind and description.

I give to my beloved brother, Reuben Hill, ten dollars, to be paid by my executors.

Hill v. Barge.

I give to my brother-in-law, Lewis Steele, for the affection I have for him, five hundred dollars, to be paid by my executors.

I do hereby constitute my trusty and beloved friends David Carter, and John Barge, my sole executors, &c.

In witness whereof, &c. I have signed and sealed, this the 25 of August, 1840.

Signed, sealed, published and declared, by the said Josiah Hill, to be his last will and testament, in the presence of us, who in his presence, and in the presence of each other, have hereto subscribed our names. JOSIAH HILL, (seal.)

Attest, J. R. YEDELL,

CHARLES T. PARTIN,

ZABUD HOLMES,

ABNER JACKSON,

SILAS M. WOOTAN.

The will was admitted to probate on the 21st September, 1840, upon the proof of the due execution of the will, by the witnesses, Yedell and Holmes.

The defendant, John Barge, answered, and admitted the making of the will by the deceased, as stated in the bill, but says that the deceased lived eleven or twelve days after it was made. Admits the probate of the will as stated, and that citations did not regularly issue to the next of kin, as stated in the bill—admits that he has been appointed sole executor of the estate. Admits that he received the estate, and has disposed of the same according to the will. Has paid all the debts, made distribution of certain slaves, which the deceased, by deeds executed by him previous to the making of the will, had given to sundry persons, and has made a final settlement of the estate with the orphans' court.

He denies that the testator was of unsound mind, and memory, but insists, that he was fully capable of making a will, and that no improper influence was exerted over him. That about two months before his death, the testator requested defendant to get Walter H. Crenshaw, Esqr. to come and write the will, and that testator then said, he would dispose of the greater part of his property to defendant and wife. That he did apply to Crenshaw, but that Crenshaw was un-

able to attend. That the testator then requested him to write the will, which he did, in exact accordance with testator's instructions, who read it over carefully, and approved of it, and at the time of its execution, and publication, signed it in the presence of four of the witnesses, who witnessed it in his presence, he declaring it to be his will. That Wootan, the last subscribing witness, signed it soon after, also by his request.

He accounts for the preference given to him, and his wife, by the testator, by alledging that he was not on the kindest terms with the complainant, or John F. Watts, the husband of his sister Prudence—but that he and his wife attended on him during his life, and sickness, and that he thereby lost nearly the whole of one fall's practice as a phpsician. That himself and wife removed to his house, for the purpose of giving him their undivided attention, and remained with him for near three months, and until his death. He denies all fraud, &c., and demurs to the bill.

The wife of Dr. Barge also answered the bill, in substance the same as her husband. The testator had neither wife, or child, living with him at the time of his death.

Much testimony was taken on both sides, which is unnecessary to be here stated. Such portions of it, as are important will be found embodied in the opinion of the court.

The chancellor refused to direct an issue of *devisavit vel non*, at the request of complainant, and considering that the testimony established the sanity of the testator, and the due execution of the will, declared it a valid will, and dismissed the bill.

The complainant prosecutes this writ, and assigns for error—

1. The refusal to direct an issue of *devisavit vel non*.
2. The decree as made upon the proof.

WATTS and PRYOR, for plaintiff in error.

1. Whenever real estate is conveyed or devised by the will, so as to form the issue of *devisavit vel non*, the chancellor is bound to allow the issue to be tried out of chancery if asked for. [Kennedy v. Kennedy, 2 Ala. 571; Johnston, et al. v. Hainsworth, 6 Ala. 443.]

2. When the testimony is so conflicting as to make it difficult to arrive at a satisfactory conclusion, it would be error in the chancellor, not to allow the issue of *devisavit vel non* to be tried by a jury, and it would be error to divest the heirs at law of their rights without such a trial. [Kennedy v. Kennedy, and Johnston v. Hainsworth, *supra*; Rogers v. Rogers, 3 Wend. 503.]

3. Where a bill is filed for the purpose of setting aside a will, which has been admitted to probate in "common form," those who claim under the *will*, and who seek to establish it, become the *actors* in the cause, and are bound to prove every fact necessary to make it a good will. And no allegations are required to be made by the complainant, except to show by what right he litigates, &c. [Johnston, et al. v. Glascock and wife, 2 Ala. R. 218; Johnston v. Hainsworth, *supra*.]

4. A will written by the principal beneficiary, is void by the civil law; and by the common law, such conduct creates a presumption against the act, and renders necessary proof of volition and capacity, as well as a knowledge on the part of the testator, of the contents of the will. And this is the case whether it be a will of personal, or of real property. [1 Myl. & K. 643; 2 Phillimore, 323; 1 Haggard, 384.] A proof of mere execution, and the calling of witnesses to attest, and saying "this is my will," will not be sufficient to rebut the presumption. See cases above, and Billingham v. Vickers, 1 Phillimore, 187, 199.]

5. The attestation of the witnesses must be in the presence of the testator. The fact that it is attested in the same room with the testator, is only *prima facie* evidence that it was done in his presence. [1 Lomax on Ex. 29, and authorities there cited; 1 Metc. 349, and authorities there cited to this point.] If it be attested in the same room, yet if, from the relative situation of the testator as to his position, or physical ability, he could not, of his own power and will, without assistance from others, have seen the witnesses sign, it is not a good will. [1 Lomax 29, 25; 1 Leigh, 6; Dewey v. Dewey, 1 Metc. 349; Powell on Dev. 56-8; 1 Mod. & M. 12; 1 M. & S. 294; Russel v. Moor Falls, 3 H. & McH. 457.]

6. Where the testator's mind is shown to be weak, and at times to be incapable of making a will, if the will be written by another benefitted by it, the will will not be sustained, unless stringent proof is made, showing that the testator had a clear understanding, and a full knowledge of the contents of the will. [Elliott's will, 2 J. J. Marsh. 342; Case of Cockran's will, 1 Monr. 263, and other cases cited above.]

Cook, contra.

As to the power and duty of the chancellor in sending out the issue, see Clay's Dig. 598, § 15; 6 Ala. R. 443.]

As to the mode of proceeding, see Johnston v. Glascock, 2 Ala. Rep. 218.

—The rule for exercising the discretion, &c., Kennedy's Heirs and Ex. v. Kennedy's Heirs, 2 Ala. 625 to 629, and 6 Ala. 443.

—The attestation, 1 Jarman Wills, 71 to 76, and note (1) on p. 75; Lomax, 29, 30; 3 Stark. Ev. 1686-7; and publication Ib. 1689.

—Fraud and capacity, 3 St. Ev. 1701-2.

—*Non compos*, 3 St. Ev. 1703-4-5, and note (1) last page.

—Importunity, 3 St. Ev. 1706, note (1.)

—Capacity, insanity, &c., 3 St. Ev. 1706-7, and notes.

ORMOND, J.—The chancellor having refused to direct an issue of *devisavit vel non*, on the application of complainant, and it being insisted that this is not a matter in the discretion of the chancellor, but is the right of the heir, whenever the validity of a will is drawn in question in a court of chancery, we will first address ourselves to the consideration of that question.

In England, this right is conceded to the heir, and an issue to try the validity of the will, is directed, as a matter of course. This results from the fact, that the court of chancery has no power to pass upon the validity of a contested will, the ecclesiastical courts having exclusive jurisdiction of the probate of testaments of personal property, and the common law courts, of devises. [3 Woodesson's Lec. 49, p. 286.]

At an early period in our history, this matter was regulated by statute. An act which was passed in 1803, and re-enact-

ed in 1806, gave to the orphans' court the exclusive jurisdiction of the probate of wills, both of real and personal estate, contains the following clause: "Within five years from the time of the first probate of any will, any person interested in such will, may by bill in chancery contest the validity of the same, and the court of chancery may thereupon direct an issue, or issues of fact, to be tried by a jury as in other cases; and in all such trials, the certificate of the oath of the witnesses, at the time of taking the original probate, shall be admitted as evidence to the jury, to have such weight as they may think it deserves: but after the expiration of the said five years, the original probate of any will, shall be conclusive, and binding on all parties concerned." [Clay's Dig. 598, § 15, and see the original act in Toulmin's Dig. 887, § 55.] It is therefore very clear, that the English rule can have no influence in the settlement of this question. Its solution must depend upon the true construction of the act just cited, which not only conferred on the courts of chancery, a jurisdiction unknown to the common law, but also introduced other important changes, of the law on this subject.

This act passed under the review of this court, in *Johnston v. Glascock and wife*, 2 Ala. 218, where it was held, that when a will is thus contested in chancery, those claiming under the will, become the actors, and are bound to support it affirmatively. To the same effect is *Johnson v. Haineworth*, 6 Id. 450. But in neither of these cases, did the question now under consideration arise, which, it is evident from what has been stated, must depend upon the proper construction of the terms employed in the statute, in reference to an issue of *devisavit vel non*: "the court of chancery may, thereupon, direct an issue or issues of fact, as in other cases."

The ordinary meaning of the term *may*, in a statute, when it concerns the public interest, or the rights of individuals, is must, or shall; and is obligatory, or mandatory, on the judge, or officer, to whom it is addressed. [Ex parte Simonton, 9 Porter, 395, and cases there cited.] In addition, the act proceeds to state what kind of testimony shall be laid before the jury, and the effect they shall accord to it,

which would not have been done, if it had been discretionary with the chancellor, to direct an issue, or not, as he might think proper. Further, by the act of 1821, when the validity of a will is contested, the orphans' court is required to impanel a jury to determine its validity, (Clay's Dig. 304, § 35,) and it would be a strange result, if a party could obtain the probate of a will, without notice to the heir, or next of kin, in the orphans' court, and thereby deprive him of the right to a jury trial in chancery. The effect of the exhibition of such a bill as this, is to require those claiming under the will, to offer it again for probate, and it seem to us, from our entire legislation on this subject, that whether the inquiry is had in the orphans' court, or in chancery, the heir, or next of kin, is entitled to an issue if he demands it.

From this it results, that the chancellor erred in refusing to award an issue, when demanded by the complainant, and as the cause must be remanded, it is proper we should consider those questions of law, which have been argued by counsel, and which must necessarily arise in the further progress of the cause.

The will offered for probate was written by Dr. Barge, the husband of the principal beneficiary of the will. This fact undoubtedly creates a presumption against the validity of the instrument. Ordinarily, when a man of sound mind, and memory, executes a will, by signing, and publishing it, and calling on witnesses to attest it, the presumption is that he knew the contents, although it is not written by him. But when the will is written by the person intended to be benefited by it, then, in the language of an eminent testamentary judge, "the presumption, and *onus probandi*, are against the instrument; but as the law does not render such an act invalid, the court has only to require strict proof; and the *onus probandi* may be increased by circumstances; such as unbounded confidence in the drawer of the will—extreme debility in the testator—clandestinity, and other circumstances, which may increase the presumption, even so much, as to be conclusive against the instrument. In the absence, however, of any circumstances of this sort, the demands of the law may be more easily satisfied. [Paske v. Ollat, 2 Phillimore, 323; see also Billingham v. Vickers, 1 Id. 199,

and Ingraham v. Wyatt, 1 Hagg. 384.] The case of Paske v. Ollat, came under the review of the Master of the Rolls, in Raworth v. Marriott, 1 M. & K. 643, who also held, that where the drawer of the will took a benefit under it, a jury trying the validity of the will, should be satisfied that the testator knew its contents; but he did not understand Sir John Nicoll, in Paske v. Ollat, to hold, that there must be direct, and positive proof of such knowledge, but that his knowledge of the contents of the will, might be established by circumstantial evidence.

This being the law applicable to this case, it will be the duty of the jury to say, whether the testator knew the contents of the will. The most usual, and most satisfactory mode of making this proof, is to show that the will was written pursuant to instructions given by the testator. Nothing of this kind appears in the testimony sent up with the record. It also appears, that the testator, at the time the instrument is alledged to have been made, was in a state of extreme debility, and had been for some time previous—that he labored under a most painful disease, to allay the anguish of which, he took large doses of opium—and that the drawer of the will was in possession of his confidence. These are all circumstances calculated to awaken suspicion, and increase the presumption which the law makes, from the mere fact that the will was written by the principal beneficiary, and increase the demand which the law exacts, of proof of knowledge on the part of the testator.

Still, it must be borne in mind, that all these circumstances of suspicion, and presumption of unfairness, may be removed by either positive, or circumstantial proof, of knowledge on the part of the testator of the contents of the will, and that it was written pursuant to his directions. But this proof should be so satisfactory, and convincing, as not to leave a reasonable doubt on the minds of the jury, that the testator knew its contents at the time of its execution.

It is further contended, that the will was not attested by the witnesses in the *presence* of the testator. The statute of this State, which, in respect to this matter, is substantially a copy of the 29 Charles 2d, requires, “that such last will and testament, be signed by the testator, or testatrix, or by some

person in his, or her presence, and by his, or her directions; and attested by three, or more respectable, (reputable) witnesses, subscribing their names thereto, in the presence of such divisor." [Clay's Dig. 597, § 1.]

The construction of this statute, is settled by numerous decisions, English, and American. The design of the statute, in requiring the attestation to be made in the presence of the testator, was to prevent the substitution of a surreptitious will. In the *presence* of the testator, therefore, is within his view. He must be able to see the witnesses attest the will, or to speak with more precision, their relative position to him, at the time they are subscribing their names as witnesses. must be such, that he may see them if he thinks proper to do so, and satisfy himself by ocular demonstration, that they are witnessing the very paper he designed to be his last will. They may subscribe their names in the same room with the testator, and yet there may be such a physical barrier, or obstruction, between him, and them, tha the could not see what they were doing, and although in the same room with the testator, would not be in his presence, within the meaning, and intention of the statute. [Neil v. Neil, 1 Leigh, 6.] So also it has been held, that when the testator desired the witnesses to go in another room and attest his will, in which there was a window broken, through which he might see them, it was held, the will was well attested. [7 Bac. A. 10; see also, Casson v. Dade, 1 Bro. C. C. 99, and Davy v. Smith, 3 Salkeld, 395, to the same effect.] Lord Ellenborough, in Doe v. Manifold, 1 M. & S. 294, referring to Casson v. Dade, held, that it was not necessary the testator should actually see the witnesses attest the will, but that he must be in such a situation, that he might see, and then in favor of the attestation, it would be presumed that he did see. [Todd v. Winchilsea, 1 Mood. & M. 12, and same case, 2 C. & P. 488.]

In this case, it appears from the testimony, that the witnesses attested the will, at the request of the testator, in the same room with him, and but a short distance from him. He was lying in bed, his head propped up with pillows, his face turned from the attesting witnesses. Some of them say he did not see them attest the will, as their backs were towards

him, and that by turning his head he could have seen them standing there—there was no obstruction intervening between him and them. It has already been stated, and shown by the cases cited, that it is not necessary to prove that the testator actually saw the witnesses subscribe their names—this would, in most cases, be impossible to be shown. It is sufficient, if from their relative position, he could have seen them. If then, the testator, by moving his head on the pillow, could have seen the witnesses subscribe their names to the paper designated by him as his will, it will be an attestation in his presence, within the meaning of the statute. It will be for the jury to determine this fact, also, from the evidence which may be adduced.

Testimony was taken on both sides, as to the capacity of the testator to make a will, at the time this will was executed, but no question of law is raised in argument on this point. The jury must be satisfied from the proof, that the testator was of sound mind, and disposing memory, before they can find the instrument a valid testament.

Decree reversed, and cause remanded.

BROWN v. CHAMBERS, ET AL.

1. A bond in the penal sum of \$10,000, by which B bound himself, on condition that D would establish the claim of B, to a right of entry under the pre-emption laws of the United States, and pay to the United States the purchase money thereof, he would deliver to D, his heirs, and assigns, a good and sufficient deed of all his right, and title to one half of said lands—is not such an estate, or interest in land in D, though the condition of the bond has been performed, as can be sold by order of the orphans' court, at the instance of the representatives of D, so as to vest in the purchaser the title of D, or to enable the commissioners appointed by the orphans' court, to assign the bond to the purchaser.

2. Such a bond is assignable under the act of 1828, and the assignee may maintain an action thereon in his own name, by showing a performance of the condition by the obligee. Whether, after the death of the obligee, the heir, or personal representative is entitled to the bond, *quere*.
3. A letter written by one professing to be a commissioner in the general land office, is not, without further proof, admissible as an instrument of evidence.
4. A plea of set-off cannot be interposed to a suit on a bond for unliquidated damages; but by taking issue on such a plea, its sufficiency is admitted.

Writ of Error to the County Court of Mobile.

THIS was an action of covenant at the suit of the defendants in error. The declaration is on a bond dated the 25th December, 1834, by which the defendant below acknowledged that he was indebted to Andrew Dexter in the sum of \$10,000; *conditioned*, that, whereas the defendant, as a joint settler with one William Reynolds, was entitled under the act of Congress of 1830, to the pre-emption of a certain quarter section of land within the district of the land office at St. Stephens, and to the pre-emption by way of float of eighty acres more of the public land in some other part of that district: the defendant applied to locate the eighty acre claim on the fraction marked *A* of section twenty-seven, township four, and range one, west, south of the thirty-first degree of north latitude, designated on the plat as containing 85 76-100 acres, and offered at the same time to pay the United States the amount required for the purchase of the original tract, and for said fraction; "but owing to different causes, the defendant was not allowed to make the said location, as aforesaid." *Further*, "*whereas*, the said Dexter has notwithstanding, undertaken to endeavor to establish the said claim to the said fraction, and agreed to pay the United States whatever may be in such case necessary for the purchase of the original tract of land and the said fraction." It is also recited that the defendant "has, in consideration of the performance of the said conditions, agreed to deliver, or cause to be delivered to the said Dexter, his heirs and assigns, a good and sufficient deed of all the right and claim" of him (de-

fendant) in and unto one undivided half part of said fraction of land. Now, in case the defendant should perform the agreement aforesaid, his said bond is to be void and of no effect.

Plaintiffs aver, that during the lifetime of the said Dexter, he fully established the claim of the defendant to the parcels of land above referred to, and advanced the money agreed by him to be advanced; "and did perform all the things specified to be done. *Further*, that after the death of "Andrew Dexter, Andrew Alfred Dexter was duly appointed the administrator of his estate, who indorsed, assigned and delivered said bond to the plaintiffs." It is also averred, that after the death of "Andrew Dexter, that Andrew A. Dexter and Sophia Dexter, his heirs at law, did assign, transfer and set apart to the said plaintiffs the said writing obligatory." *Further*, that the said administrator did in the county court of Mobile, make application for the sale of the said lands, for the payment of the debts of his intestate, and an order was accordingly made directing the sale of the same by commissioners. A sale thereupon took place, at which the plaintiffs became the purchasers, and by the sanction of the county court, received an assignment of the aforesaid bond from the commissioners—all which appears of record in that court.

The declaration then concludes, that the plaintiffs are the assignees of the bond; that since the assignment, they have demanded of the defendant the fulfilment of his covenant, and that previous thereto, the administrator and heirs of Andrew Dexter made a similar demand; but, &c.

There was a demurrer by the defendant, which being overruled, he pleaded—1. That Andrew Dexter did not establish the title of the defendant to the lands referred to in the plaintiff's declaration, nor pay to the United States, the money necessary to perfect the defendant's title to the same; nor have his heirs, executors, &c. done so since his death. 2. That after the execution of the bond, Andrew Dexter refused and declined to establish the title of the defendant to the fraction of land therein described, and to advance the money required by the United States in payment of the lands to which the contract relates. In consequence of such refusal, the defendant was compelled to employ John Forsyth, junior,

to establish his claim and title to the same; and the purchase money being the sum of \$500, was advanced and paid by the defendant, and not by the said Dexter. 3. That defendant recovered a judgment against the administrator of Andrew Dexter, in the county court of Mobile, on the 19th March, 1839, for the sum of \$1,163 56, while the bond was in the administrator's possession as the representative of his intestate—this judgment the defendant offered to set off against the plaintiff's cause of action.

The cause was submitted to a jury, and the defendant excepted to the ruling of the court. It is shown by the bill of exceptions—1. That the plaintiffs, to make out their case, offered the proceedings in the orphans' court, to which the defendant objected, because they did not vest in the plaintiff a right to maintain the present action; but his objection was overruled, and thereupon he excepted. 2. The plaintiffs next adduced a letter, dated "General Land Office, 7th Sept. 1836," addressed to "A. Dexter, Esq. Mobile, Ala." signed "Ethan A. Brown, commissioner." This letter states that the writer had that day advised the land officers at St. Stephens to permit the entries of John M. Brown and William Reynolds, of the land claimed by them, under the act of 1830, and by floats, &c. It was proved by a witness that he had seen the signature of the writer to official papers at the land office at Washington and other land offices, and from the resemblance, believed the signature to be genuine. The defendant objected to the reading of the letter, but his objection was overruled, and he excepted. 3. The plaintiffs also offered the deposition of Andrew Alfred Dexter, to which the defendant objected, on the ground that the witness was incompetent; the objection was overruled, and the defendant again excepted.

The plaintiffs read to the jury the patent of the United States for the lands, dated in 1839, which was produced by the defendant on a notice from the plaintiff calling for it.

4. The defendant then offered to show, that at the time of the sale, and other transfers by which the plaintiffs claimed, the lands referred to in the bonds were held adversely by persons claiming pre-emptions; and that these persons so held until they were ousted by the defendants in actions of

ejectment under his patent—this evidence was objected to by the plaintiffs, the objection sustained, and thereupon defendant excepted. 5. The defendant next adduced as evidence under his plea of set-off, a judgment in an action by the defendant against Andrew Dexter in his life-time, which was recovered against his administrator before the date of any of the transfers under which the plaintiffs claimed a right of action—this judgment is wholly unpaid; but upon the plaintiffs' objection, this evidence was rejected, and the defendant again excepted.

The court charged the jury—1. That the purchase by the plaintiffs, under the proceedings in the orphans' court not only vested in them the interest in the lands sold, but also the interest in the bond for the purpose of this suit—the sale operating as an assignment, and no adverse possession could defeat their interest. 2. That the construction of the letter read by the plaintiffs to the jury, was, that the title of the defendant had been established, and was a fulfilment of Dexter's undertaking. To all which the defendant excepted, and prayed the court to charge the jury—1. That Dexter was bound under his contract to procure from the government such acknowledgment, or action, as vested in Brown a title to the premises. 2. That it was necessary for the plaintiffs to prove a demand for title. These several charges were refused, and the defendant excepted. A verdict was returned for the plaintiffs, and judgment was thereon rendered.

P. PHILLIPS, for the plaintiff in error made the following points: 1. The assignee of a personal contract cannot maintain an action thereon in his own name, although the contract stipulate for the performance of a duty, by or in favor of a party or his assigns, and be assigned by the consent of him on whom the duty devolves. [3 Hill's Rep. 88; 14 Mass. Rep. 107.] Such an action is not maintainable under the statute, which extends to bonds for the payment of money, or other thing—gives an action against the indorser, and allows payments, discounts and sets off against an assignee, if the obligor, or maker, possessed them previous to notice of the assignment. [Clay's Dig. 381, § 6; 1 and 2 Ohio Rep. 400.]

2. Covenant will not lie on the *condition* of a bond, but it must be on the bond itself, and the breach alledged should be the non-payment of the penalty. [2 Bac. Ab. 63, note A; 1 Paine's C. C. Rep. 422; 4 Ohio R. 214.]

3. If the decree of the orphans' court could authorize such a sale of the land as invested the purchaser with a legal title to the bond, the sale required confirmation to make it effectual, and there is no proof that this was ever done. [5 Ala. Rep. 324; Id. 475.]

4. There was no such title to the lands in Dexter as the orphans' court could order to be sold—he had neither title, possession, or the right of possession—at most his representatives could have sought a specific performance of his contract in equity.

5. The signature of the commissioner of the general land office was not proved, so as to have authorized the admission of it as evidence; nor did it prove that the title had been established pursuant to the covenant. [1 Greenl. Ev. 612; 2 Ala. Rep. 703.] It was addressed to Dexter and not to the officer at St. Stephens.

6. Dexter was an incompetent witness, and his deposition should have been excluded—he shows that Williams's name was used for witnesses benefit, and the latter would of course be liable to him for the costs. [1 Greeel. Ev. 428; 3 Johns. Ch. R. 612; 8 Ala. R. 846; Clay's Dig. 381, § 6.]

J. A. CAMPBELL, for the defendants in error, insisted—1. That the bond was for the performance of a duty, if not for the payment of money, or other thing, and is therefore assignable under the acts of 1812 and 1828. [Clay's Dig. 381, 383, § 6, 12.] Plaintiff's claim, as assignees of the administrator, heirs, and under the sale in virtue of the decree of the orphans' court—it may not require all these to pass the legal title, but certainly they are sufficient for the purpose.

2. The orphans' court may order the sale of an inchoate title to lands—the averment of the sale—its confirmation, &c. by that court is alledged, and it is fully sustained by the proof. [7 Ala. 855.] The transfer of the heirs conveys the title and authorizes a suit. [1 Wms. Ex'rs, 519; 4 M. & S. Rep. 53.]

3. Covenant will lie on the bond declared on, and the breach is well assigned. [2 Ala. Rep. 425 ; 4 Id. 212.]

4. The signature of the commissioner, E. A. Brown, was sufficiently proved to have authorized the admission of the latter—the witness became acquainted with the handwriting of the commissioner, by having seen authentic official documents written or signed by him. [3 Phil. Ev. C. & H's notes, 1324.] To the competency of this evidence no objection was taken—but its admission was resisted, because its genuineness was not shown. The patent shows that the title was completed, and if necessary the letter could be used to show the exertions of Dexter, though it may be inferred that there was other evidence on the point. It may be that the letter was superfluous, yet being before the jury, the court might have told the jury what was its proper interpretation and effect.

5. Dexter, the administrator had no interest in the suit, and was not a party to the record—all that he had was an expectation, and that was released—as for the costs, he could not have been charged with them, and could not claim a share of the proceeds. His testimony did not relate to any point material in the case.

5. The bond descended to the obligor's heirs, while the debt due by him to the defendant, was payable by his administrator, from the personal assets. By the sale of the lands the proceeds were placed under the control of the orphans' court, and the defendant may go there and claim his proper proportion. The present action is brought for the recovery of unliquidated damages, and in such case a set-off is not admissible. [7 Ala. Rep. 359.] The counsel for the plaintiff in error does not notice the refusal to charge that a demand was necessary previous to the institution of the suit—under the pleadings, however, the refusal was proper.

COLLIER, C. J.—The act of 1822, authorizes an executor or administrator, who has not power by the will to sell real estate for the purpose of paying debts, or to make more equal distribution among the heirs, devisees or legatees, to file a petition in the orphans' court of the county in which letters of administration, or letters testamentary have been granted,

setting forth that the estate of his testator or intestate is not sufficient for the payment of the just debts of such testator or intestate; or that the real estate of such testator or intestate cannot be equally, fairly and beneficially divided among the heirs or devisees of such testator or intestate without a sale of the real estate, setting out and particularly describing in such petition the estate proposed to be sold, and the names of the heirs or devisees of the same—which are of age, and which are infants or *femes covert*. [Clay's Dig. 224, § 16.] Under this statute, it has been decided that an equitable title could be sold by a decree of the orphans' court, and the purchaser would stand in the same predicament in respect to the title, as the heirs did ; and that a mortgagor's interest, under an order of that court, would confer upon the purchaser the right to redeem. [Doe, ex dem. Duval's heirs, v. McLoskey, 1 Ala. Rep. N. S. 734 ; Evans' adm'r v. Mathews, 8 Ala. Rep. 99.] It is insisted that these decisions authorized the proceedings and decree in the orphans' court, for the sale of a moiety of the lands described in the bond, and that the commissioners appointed to execute the decree might with the subsequent sanction of the court, indorse the bond, and thus invest the purchaser with the right to prosecute not only equitable, but legal remedies on it. The citations certainly do not support this argument, and we think it cannot be maintained. Conceding that the contract evidenced by the bond, is consistent with the spirit and policy of the pre-emption laws, and the obligee performed every stipulation required of him, so as to have authorized him to enforce a specific performance in equity, and still it does not follow that the orphans' court could invest the commissioners with authority to make such an assignment of the bond as would entitle the assignees to sue at law in their own names, and alledge as a breach the failure to convey a moiety of the lands to him. If the sale effected any thing, it was nothing more than to place the assignee, in respect to the lands in the same situation as the obligee stood ; and as the obligee would have been compelled to go into equity to perfect his title, the same remedy would have been appropriate for the purchaser of his interest. The decree, if conformable to law, directed the commissioners to sell the *land*—not the *bond* under which the obligee, in his

lifetime, and his heirs and administrators after his death, claimed a right in equity to a moiety. This is perfectly clear, not only from the section of the act cited, but from several sections which follow it. The fourth section enacts, that the "court shall not decree or order a sale of the real estate" described in the petition, where the allegations are denied ; unless satisfied by proof, &c. ; and commissioners shall be appointed, in the order or decree, with directions to sell the *estate*, &c. By the sixth, it is provided, that upon the coming in of the report of the commissioners, the court shall render a final decree in the cause ; "and if the terms of the sale shall have been complied with by the purchaser of the *estate*, the commissioners shall be directed, by such final decree, to convey the estate sold, to the purchaser." Again : the seventh section declares that "whenever the court shall, upon a final hearing of the cause, decide that the *estate* shall not be sold, the judge shall dismiss the petition," &c. [Clay's Dig. 225, § 19, 21, 22.] These several provisions show, that the court acts upon the "real estate described in the petition, and formally conveys through the agency of commissioners, the title which the deceased had therein, and that commissioners cannot assign a penal bond which stipulates to make a title upon certain conditions, so as to authorize the assignee to sue on it at law. Such a power cannot be legitimately conferred ; and in fact the decree found in the record shows, that it was the interest which the intestate died possessed of, in the lands described in the condition of the bond. The confirmation of an assignment, if made by the court, as alledged, was *coram non judice*—it was something beyond and independent of the decree of a sale, and could have no legal effect. A bond to make a title, upon the payment of money, or the performance of some other duty, is, in no sense, a *covenant running with the land*, upon which the purchaser of the obligee's interest in the land may maintain an action in his own name. Whether, in a case circumstanced as the present, it would be allowable for the purchaser to sue in the name of the administrator or heirs for his own use, is a question which we need not, now specially consider. However this may be, we have seen that the intestate had no such estate in the land as the orphans' court could order to be sold, and that under the de-

cree the commissioners could not assign the bond to the purchaser.

We come now to consider whether the bond declared on, can be transferred by indorsement, so as to pass to the assignee a legal title therein. The act of 1812, "concerning the assignment of bonds, notes, &c., and for other purposes," enacts, that "All bonds, obligations, bills single, promissory notes, and all other writings for the payment of money, or any other thing, may be assigned by indorsement, whether the same be made payable to the order or assigns of the obligee or payee or not; and the assignee may sue in his own name, and maintain any action which the obligee or payee might have maintained thereon previous to assignment," &c. [Clay's Dig. 381, § 6.] The act of 1828, "defining the liability of indorsers, and for other purposes," after declaring that the remedy on foreign and inland bills of exchange, and promissory notes, payable in bank, shall be governed by the rules of the law merchant, as to days of grace, &c., provides, that "all other contracts in writing, for the payment of money or property, or performance of any duty of whatever nature, shall be assignable as heretofore, and the assignee may maintain such suit thereon, as the obligee or payee could have done, whether it be debt, covenant, or assumpsit. [Clay's Dig. 383, § 11, 12.]

It is well settled that bonds cannot be assigned at common law, so as to entitle the assignee to an action in his own name thereon. But courts of law will recognize the assignment of a bond, so as to refuse to give effect to a subsequent release of the debt by the original obligee. The assignment, it has been held, amounts to a contract that the assignee shall receive the money to his own use, entitles him to sue in the assignor's name, and is a sufficient consideration for a promise by the obligor to pay the assignee. [1 Bos. & P. Rep. 447; 2 Black. Rep. 1269; 1 Pick. Rep. 504; 1 Stew. & P. Rep. 60; 4 Rand. Rep. 266; 7 Conn. Rep. 399; 15 Mass. Rep. 485; 2 Greenl. Rep. 510; 2 Stew. Rep. 259; 2 Hals. Rep. 94; 3 G. & Johns. Rep. 214; 3 Hill's Rep. 88; 5 Pet. Rep. 599.] The assignee of a bond takes it at his peril, and stands in the place of the obligee, so as to let in every defence which the obligor had against the obligee at the time of notice of

assignment. [1 Dall. Rep. 23, 444; 4 Rand. Rep. 266; 5 Binn. Rep. 232; 4 Serg. & R. Rep. 177; 9 Id. 141; 1 Lord Raym. 683.]

By a statute of Virginia, passed in 1748, it is enacted that "an action of debt may be maintained upon a note or writing, by which the person signing the same shall oblige himself to pay a sum of money or quantity of tobacco to another." In 1795, an act of the same State provided that "assignments of all bonds, bills and promissory notes, and other writings obligatory whatsoever, shall be valid; and an assignee of any such may thereupon maintain any action in his own name, which the original obligee or payee might have brought, but shall allow all such discounts, not only against himself, but against the assignor before notice of the assignment was given to the defendant." [1 Rev. Code of Va. 484, § 4, 5.] In *Henderson, et al. v. Hepburn, et al.* 2 Call's Rep. 232, it was said that the former act did not embrace a bond with a collateral condition; that whenever a bond is made with a smaller specific sum mentioned in the defeasance, or the bond is single, so that judgment may be given for that sum with interest, and for damages to be ascertained by a jury; there it is not necessary to assign particular breaches, and the bond will be considered one for the payment of money within the meaning of the statute. But if the principal sum for which the judgment is to be rendered is unascertained, and the intervention of a jury is necessary to adjust the damages; or if a special assignment of breaches is requisite to inform the defendant for what cause the action is brought, then the bond does not come within the act, so as to entitle the assignee to sue in his own name. [See also *Lewis v. Harwood*, 6 Cranch's Rep. 82; *Craig v. Craig*, 1 Call's Rep. 483.] In *Meredith v. Duval*, 1 Munf. Rep. 76, it was held that an assignment made after the statute of 1795, by which bonds with collateral conditions were made assignable, is good, though the bond was dated before the act.

Under the statute of Kentucky, which enacts that all bonds, bills and promissory notes, whether for money or property, shall be assignable, and the assignee may sue for the same, in the same manner the original obligee or payee could do, it has been decided that a bond with a condition for the

conveyance of land is assignable. [Conn v. Jones, Hard. R. 8; Sloan v. Griffith, Ib.] The question again arose in Newfong v. Wells, Id. 561, and the court said, that "property is *nomen generalissimum*, including every visible subject of ownership; and although, upon comparing the act of 1798 with that of 1796, some doubt remains whether the legislative intention in enacting that of 1798, extended beyond bonds for personal property, passing by delivery; yet that the construction shall be settled, is of more importance than what it shall be. The construction given by the decision of Conn v. Jones, upon solemn argument, appears best adapted to the situation of our country, and will not be now disturbed." But in Bowman v. Frowman, 2 Bibb's Rep. 233, it was held that there was no rule in the construction of statutes, that will justify the extension of the Kentucky act to articles of agreement containing reciprocal covenants, for by designating the kinds of contracts that may be assigned, it "negatives the idea that the legislature intended to make other instruments of a different species from those mentioned, assignable. Consequently, it was adjudged that an article of agreement *for the conveyance of land*, by one party, and the payment of a price therefor by the other, is not assignable, under the statute. [See also, Craig v. Miller, 3 Bibb's Rep. 443.] So, if part of a note or bond is to be discharged in *personal services*, it is not assignable under the statute. [Hulbert v. Dearing, 4 Litt. Rep. 9; Henry v. Hughes, 1 J. J. Marsh. R. 454.] Nor does an obligation to pay money, and to do other acts, which are neither a payment of money or property, come within the Kentucky statute; neither does it embrace a bond to collect money and pay it over to the obligee. [Force v. Thompson, 2 Litt. Rep. 166.]

In Missouri there is a statute substantially the same, if not identical with that of Kentucky; under which it has been held that a note for a certain sum, payable in work, is not assignable, so as to authorize the assignee to sue in his own name. [Bothick's Adm'r v. Purdy, 5 Miss. Rep. 83; Able & Isbell v. Shields, et al. 7 Id. 120; J. & P. Miller v. Newman & Paulsel, 8 Id. 355.]

We think it perfectly clear that the bond declared on, is not embraced by the act of 1812. The terms of that enact-

ment are, that *all bonds, &c. and all other writings for the payment of money, or any other thing, may be assigned, &c.* True, in technical parlance, thing is a word of extensive meaning, including not only lands, tenements, &c., but personal or moveable property; yet it may well be questioned whether the term thing, where it occurs in the statute, would not be restricted in its operation to things moveable, even if there were no accompanying words of limitation. The intention of the act, and the subject matter would perhaps indicate the propriety of thus restricting it. But if it be doubtful whether this conclusion can be supported by this general mode of reasoning, and by reference to extraneous facts, we think it obvious that the term *payment* in connection with *money or other thing*, shows that by thing we are to understand something transmissible from place to place; that is personal property which could be removed at the pleasure of the owner. In neither technical nor popular phrase do we speak of bonds or other writings for the payment of land; these usually stipulate for the conveyance of the title. The statute of Kentucky, which was held to embrace bonds, with a condition to convey lands, employs terms of much broader import than our act of 1812, yet in *Newfong v. Wells*, the court of appeals of that State intimate a doubt whether their statute had not been too greatly extended by construction, although it was thought safer to follow than depart from precedent; and in *Bowman v. Frowman*. it was held, that it could not be extended to articles of agreement containing reciprocal covenants. Consequently, a contract for the *conveyance of land*, by one party, and *the payment of a stipulated price* therefor, by the other, is not assignable, under the statute of that State.

It must be admitted, that our act of 1828, employs terms of more comprehensive import than are used in that of 1812. While the latter is limited to *bonds and all other writings for the payment of money, or any other thing*, the former embraces *all contracts in writing for the payment of money, or property, or performance of any duty of whatever nature*. The direction that these shall be assignable as they previously were, instead of restricting the act to such writings as were

within the statute of 1812, is only intended to indicate the mode of transfer, viz : by indorsement.

So the act of 1828 is much broader than the Kentucky statute, which only includes *bonds, bills and promissory notes for money or property*, and is as comprehensive as the Virginia act of 1795 ; which in terms, and by construction, extends to *all bonds, bills, and promissory notes, and other writings obligatory* ; and of course to bonds with reciprocal covenants, which stipulate to make titles to the land to the obligee. Upon the first presentation of this case, the question presented itself, whether the general terms “ performance of any duty of whatever nature,” should not be limited to contracts in writing, where the undertaking was absolute and unconditional, although the duty was to be performed *in futuro*. But further reflection and examination has satisfied us, that the assignee of a bond with *reciprocal covenants* may maintain an action against the obligor in his own name, upon showing that the undertaking of the latter has become absolute by the performance of the conditions which are incumbent on the obligee. What has been already said in connection with the statutes of several of our sister States upon this subject, will suffice to show the reasoning by which this conclusion is attained, and render it unnecessary here to reiterate the argument. [See *Burt v. Henry*, 10 Ala. R. 874.]

In the transcript, we find a bond such as that declared on, set out *in extenso*, together with a receipt purporting to have been made by the defendant, on the 20th April, 1836, for two hundred dollars, paid by the intestate on account of his obligation to pay for the lands to which the defendant and intestate are entitled by pre-emption, in the name of the former, and William Reynolds. In this receipt it is stated that the defendant is to advance the remaining two hundred dollars, and the intestate is to repay him with interest in ninety days after the date of the above receipt. Immediately following the bond and receipt, there is a writing subscribed with the names of the commissioners appointed by the orphans’ court to sell these lands, and also with the name of the administrator in his representative character ; which writing is as follows : “ Mobile, November 7th, 1840. The land for which the foregoing bond was given, and also that to

which the annexed receipt refers, having been purchased by John A. Chambers, and William W. Williams, at a sale of the interest of the late Andrew Dexter therein, the foregoing bond and the annexed receipt are hereby assigned to them."

Conceding that an administrator may transfer the choses in action of his intestate's estate, in payment of his debts, or in the legitimate execution of his trust, and it may perhaps be questioned, whether, by joining the commissioners in the assignment of a bond, which we have seen they could not make, with the view of consummating a sale of land which the orphans' court had not the power to order, the assignee became vested with a legal title to the bond. But it is doubtful whether these papers can be considered a part of the record, and we therefore decline furnishing a solution to the question; the more especially as the cause may here be disposed of without a decision of the point. There is nothing in the transcript to indicate that the bond was ever assigned by the heirs of the obligee. We have not been able to find any decision in which the question arose, whether the heir or personal representative was entitled to a bond in favor of a deceased person, conditioned to make titles to land. The cases most analagous are those upon covenants in respect to the realty, in which it is held, that if a breach occur in the lifetime of the obligee, the executor or administrator must sue, if after his death, the heir must sue. [See 2 Bibb Rep. 170, 180; 1 Lomax Ex. 286 to 293; 2 Id. 360, *et seq.* and citations in notes.]

It may be assumed as a postulate, that where the demand offered as a set off, is a debt of the assignor, and would not be admissible if the action were brought by him, it cannot be received where the suit is in the name of the assignee. This conclusion is supported by the act of 1812, and is the result of the general analogies of the law. [Clay's Dig. 381, § 6.]

It is provided by our statute, that "in all cases where there are or shall be mutual debts" subsisting between the plaintiff and defendant, or if either party sue or be sued, as executor or administrator, where there are mutual debts subsisting between the testator or intestate, and either party, one debt may be set off against the other," &c. [Clay's Dig. 338, § 141.] This enactment, it has been held, is a substantial

copy of the two acts of 2d and 8th George II, on the same subject; under these statutes it has been decided that unliquidated damages cannot be the subject of a set off, although secured by a bond with a penalty; but a penal bond is only admissible in such cases, where it stipulates for the payment of a *certain sum of money*. [Dunn, use, &c. v. White & McCurdy, 1 Ala. Rep. 645.] And in McCord v. Williams and Love, 2 Ala. Rep. 71, it was determined that the damages resulting from the breach of a contract, are unliquidated, when there is no criterion provided by the parties, or by the law operating on the contract, by which to ascertain the amount of damages.

In Wilmot v. Hurd, 11 Wend. Rep. 584, it was decided that a set-off was not allowable where an action was brought for the breach of a warranty in the sale of a horse; that a set-off can only be allowed in actions founded upon demands, which could themselves be the subject of a set-off. [See Burgess v. Tucker, 5 Johns. Rep. 105.] So a set-off cannot be pleaded either in this country or in England for a moneyed demand, the amount of which is not referable to some certain standard. [Roebuck v. Tennis, 5 Monr. Rep. 82; see also Sickles v. Fort, 15 Wend. Rep. 559; Driggs v. Rockwell, 11 Wend. Rep. 504; Littell v. Shockley, 4 J. J. Marsh. Rep. 245.]

The sum which is demandable for the breach of the covenant contained in the condition of the bond is uncertain, and is to be ascertained by extrinsic proof, and according to the authorities cited, the defendant's judgment, though unobjectionable in itself as a set-off in a proper case, could not be allowed as such, in the cause before us, if the objection to its allowance had been regularly made in the court below. But it does not appear that the plea of set-off was demurred to, and we infer from what is said in the bill of exceptions, that it was submitted to the jury as the basis of one of the issues. Assuming this to be so, if the plea correctly described the judgment as to its amount, time when rendered, &c. the plaintiffs could not object to its admission; for by consenting to go to the jury with an issue upon the plea, they admitted its sufficiency, and waived in advance an objection to the record, by which it could be sustained.

In respect to the first charge to the jury, we have already seen that it cannot be supported. The sale of the land under the decree of the orphans' court was ineffectual to pass the legal title to the bond to the purchasers; and the unauthorized assignment of it by the commissioners does not appear to have been confirmed by that court, even if it had been competent to validate it by its sanction.

Without stopping to inquire whether the letter of the commissioner of the general land office, addressed to the intestate, was admissible, we think the construction placed upon it clearly indefensible. This letter is dated the 7th September, 1836, and informs the intestate that the writer had informed the land officers at St. Stephens to permit the entries of John M. Brown and William Reynolds, of the land claimed by them under the act of 1830 and by floats; and to refund to Messrs. Gager & Street the amount erroneously paid by them. For his reasons for that decision, he refers to his communication to the land officers of that date. Giving to this paper the most extensive meaning of which it is susceptible, and it does not appear that the confirmation of the claims referred to, was induced by any agency of the intestate, but merely that they had been confirmed. Nor does it establish the fulfilment by him of the stipulations of his contract, as evidenced by the condition of the bond. But conceding that the meaning of the letter was rightly interpreted, it may be asked, whether it is entitled to any influence as an instrument of evidence? It is unofficial, and as an admission, we think must be regarded as *res inter alios*, and is obnoxious to the objection that the facts it narrates are not duly verified by the oath of the writer.

Other points are raised upon the record, and have been discussed at the bar; but the view we have taken of the questions considered, is sufficient to show that the law was incorrectly ruled by the circuit court, and may perhaps serve as a guide to the ultimate decision of the cause. The judgment is reversed, and the cause remanded.

SCOTT, HARPER & CO. v. DANSBY.

1. An obligation, signed with the partnership name, but in the body of which it is recited, that it was the act of one of the partners, and given as a security for his individual debt, is not on its face a partnership act.
2. A mortgage being executed in the name of a partnership, by one of the partners, it is not competent to prove the admissions, either of the mortgagee, or the partner who executed it, that it was made to secure a debt due by the firm.
3. Upon a bill filed to subject property as belonging to a partnership, to the payment of a debt alledged to be secured by a mortgage of the partnership, no decree can be had, upon proof that the property belongs to one of the partners, individually.

Error to the Chancery Court of Greene.

THE bill was filed by the plaintiffs in error, to foreclose a mortgage, alledged to have been made by E. & I. Dansby ; on certain slaves, and alleges a sale by the complainants to E. & I. Dansby, of certain slaves, which were to be paid for at certain periods, and for the payment of which certain bills of exchange were drawn. That the bills of exchange were not paid at maturity, and were duly protested, and that on application of the complainants to E. & I. Dansby, they agreed to secure him by giving him a *lien* on the slaves, and for that purpose, executed the following instrument, on the 5th June, 1837 :

State of Alabama, Washington county. Know all men by these presents, that for and in consideration of the sum of \$4,865 20, in full payment for a certain lot of negroes, named as follows: [here follow the names and description,]—which negroes I warrant to be sound in body and mind, as when purchased of Scott, Harper & Co., in whose favor this obligation is also drawn ; and I do also warrant and defend, the right and title of the above named negroes, to the said Scott, Harper & Co. The condition of the above obligation, or title, is such, that whereas, I, Elijah Dansby, am indebted

Scott, Harper & Co. v. Dansby.

to Alexander Scott, in two bills of exchange, one dated 2d January, at ninety days, addressed to Jacob Boyd, at Mobile, endorsed by Richard Compton, Isham Dansby, and James C. Drew, with three credits, amounting in all, to \$1,187 80. The balance, a bill of exchange for three thousand dollars, drawn the 3d January, on Jacob Boyd, and endorsed as the other above named. Now, so soon as the above bills of exchange be paid, with lawful interest to the said Scott, then the above transfer to be null and void, if otherwise to operate only as a *lien* on the above named negroes, and the said negroes to be kept in possession of Elijah Dansby, and forever to be held liable to said debt, until the whole is paid, or so much thereof as will secure the said debt. In testimony whereof, I have hereunto set my hand, and seal, this 5th January, 1837.

E. & J. DANSBY.

Teste, W. G. COLE.

SAMUEL LEE.

This instrument was recorded in Washington county, where the negroes were at the time it was made, and it is alleged, "was signed by the said Elijah Dansby, with the firm name of E. & I. Dansby, and was so signed with the knowledge, and by the authority of the said Isham Dansby, or if not by his authority, the said Isham, upon being informed thereof, assented to, and acquiesced in such signature, and the execution of said mortgage."

The bill further charges, that the bills of exchange were not fully paid off; that judgment was obtained thereon, and a portion, which is set forth, is still unsatisfied. That in the spring of 1839, E. & I. Dansby sold the said slaves to Isaac Dansby, with full knowledge on his part of the mortgage, who carried them all out of the State except two, which are described, which he carried to Marengo county, where they still remain in his possession. That John L. and M. Burwell have obtained a judgment against E. & I. Dansby, and have caused the said two slaves to be levied on, and that Isaac Dansby has claimed them as his property, and given bond to try the right. That the complainants are informed, and believe, that Elijah, Isham, and Isaac Dansby, have each of them run off, and removed their property from this State, to avoid

the payment of their debts, and that the security given by the said Isaac, to have the slaves forthcoming to abide the judgment of the court, is insufficient, and have reason to believe, that the slaves will be removed out of the State, so as not to be subject to their mortgage. The prayer of the bill is for an injunction against the removal of the slaves, &c.

J. L. & M. Burwell answer the bill, and deny all knowledge of the mortgage, and require proof of the allegations of the bill, in relation to it. They admit the levy on the slaves in virtue of the judgment obtained by them, against E. & I. Dansby, and insist on their right to sell, &c.

Decrees *pro confesso* were rendered against Elijah and Isham Dansby.

The deposition was taken of Lee, one of the subscribing witnesses to the mortgage, who proves, that Elijah Dansby signed the firm name of E. & I. Dansby to the mortgage, Isham Dansby not being present. That he heard both Scott, and Elijah Dansby say, that the slaves were purchased from the former, by the firm of E. & I. Dansby.

The chancellor dismissed the bill, because no authority was shown authorizing E. Dansby to execute the mortgage in the name of the firm. This is now assigned as error.

HENLY, for plaintiff in error, insisted—

1. That it is shown by the bill, answers and proof, that the slaves mortgaged to the complainant's by the instrument set out in the bill, were sold by the complainants to *Elijah Dansby*, for the firm of E. & I. Dansby.

2. That at or about the same time *Elijah Dansby* executed the mortgage set out in the bill, to secure to the complainants the debt contracted in the purchase of said slaves.

3. That the slaves having been purchased as partnership property, Elijah Dansby, one of the co-partners, was fully authorized to pledge or mortgage them to secure a partnership debt. [Story on Part. 144, *et seq.*]

4. That if Elijah Dansby was authorized to pledge or mortgage the partnership property, then the instrument set out in the bill is properly executed. It is a mere security in the nature of a mortgage, and does not appear to have been

sealed. The property conveyed was personalty, and it was not necessary that the instrument should be sealed.

5. That even if it shall be held that the instrument is a sealed instrument, still it is good to bind the firm of E. & I. Dansby, as it would have been effectual without a seal, and the addition of a seal cannot vitiate it. [St. on P. 178, 179; Lucas v. Bank of Darien, 2 Stew. Rep. 280; Ib. 296-7-8.]

6. That if it shall be held that the mortgage was not properly executed to bind the firm of E. & I. Dansby, yet being executed by Elijah Dansby, in his own person, it was certainly effectual to convey his interest in the slaves—that though it might not bind the firm of E. & I. Dansby, it clearly bound him. The chancellor ought therefore at least to have separated the interest of Elijah Dansby in the slaves conveyed by the mortgage, and have decreed a foreclosure at least so far as that interest extended. [Story on P. 150, 176, 179.]

F. S. LYON, contra.

The complainants charge in their bill, that E. & I. Dansby, *partners*, made the mortgage in controversy, that it was signed by Elijah Dansby, with the firm name of *E. & I. Dansby*, and was so signed with the knowledge, and by the authority of Isham, the other partner.

Isaac Danby claimed title to the slaves mentioned in the mortgage, and they were levied upon as his property to satisfy Burwell's execution. The mortgagees enjoined the sale.

Process was served on Isham Dansby, and the bill as to him taken *pro confesso*, and publication was made as to Elijah Dansby, and the bill as to him taken as confessed. The Messrs. Burwell answered.

The judgment *pro confesso* against E. & I. Dansby amounts to an admission of the execution of the mortgage, as alledged in the bill, so far as they are concerned—but does not prove the assent of Isham Dansby, as against the Messrs. Burwell, the plaintiffs in execution, and parties, defendants to the bill.

The testimony does not establish the execution of the mortgage by the two mortgagors, nor does it show the assent

of the partner who did not sign—such proof was necessary as against the defendants, Burwells.

One partner cannot bind another by an instrument under seal. Hence the decree in favor of the respondent was proper.

It is insisted that there is no proof in the record, showing that the slaves were purchased as partnership property, or that they belonged to the firm of E. & I. Dansby.

ORMOND, J.—The object of the bill is, to have the benefit of a mortgage alledged to have been made by E. & I. Dansby, on certain slaves, to secure the payment of a debt due by them to the plaintiffs in error. The instrument on its face purports to be made to secure a debt due from Elijah Dansby, to Scott, Harper & Co., and stipulates for his possession of the slaves mentioned in the mortgage, subject to the *lien* then created. It is signed with the firm name of E. & I. Dansby, and it is alledged in the bill, that this was done by Elijah Dansby, with the approbation of I. Dansby, or that he afterwards assented to it. There is no proof of this allegation of the bill; and in our judgment it cannot be inferred from the mere fact that the partnership name is signed to this instrument, that it is an obligation entered into by the partnership, when the body of the instrument shows it to be the act of Elijah Dansby, and to be given as a security for his individual debt.

Being the act of one partner professing to bind the firm, it was certainly necessary to establish, that the debt thus acknowledged was a debt due by the firm, and that the property conveyed was partnership property. The only testimony offered, is that of the subscribing witness, Lee, who states, that he was informed both by Scott, the mortgagee, and E. Dansby, the mortgagor, that the slaves mentioned in the mortgage, were sold by Scott, Harper & Co. to E. & I. Dansby. The statement of Scott was clearly inadmissible to prove this fact against a creditor of the firm. As the mortgagee, taking the obligation of one of the firm, for the payment of a firm debt, he has a direct interest in establishing it. The admissions of E. Dansby are only admissible so far as they relate to, or qualify his possession of the slaves. The

admission of one in possession of property, that the title is in another, is admissible, either as a part of the *res gestae*, or as a declaration against his interest; but it has never been supposed that it was competent for a party to prove by his own declarations, the nature of his own title, though he might admit that he had none, and the title was in another. This question was fully considered in *McBride and wife v. Thompson*, 8 Ala. R. 650, where it is said the declaration of the person in possession is only proper to qualify or explain the possession, but that "declarations as to the title, how, when, and from whom he acquired it, are inadmissible." See also, this question further considered in *Abney v. Kingsland*, 10 Id. 360. It is quite obvious, the declaration of E. Dansby, here relied on, goes beyond the limit here assigned to this species of evidence. It does not merely relate to, and qualify the possession of the slaves, but it goes to his own title, and the manner of its acquisition.

The declaration of E. Dansby would not be competent testimony to prove that he owed this debt to Scott, Harper & Co., as against a creditor whose debt then existed, but was clearly incompetent to prove that it was a partnership debt, as he had a direct interest in fixing a joint liability upon his co-partner. It may also be doubted whether any portion of this admission is competent testimony against his co-defendants, the Burwell's, as it is very clear it would not have been, if repeated in an answer to the bill.

There is then, no competent proof in the record, that the debt secured by this instrument was due from the firm of E. & I. Dansby, or that the slaves mortgaged were partnership property.

But it is contended, that the chancellor should at least have decreed the sale of the interest of E. Dansby in the slaves, as there can be no doubt that he executed the mortgage, and the slaves were either his own individual property, or the property of the firm. The complainants must recover according to the allegations, and proof. The allegations of the bill are, that the mortgage was executed in the part-

nership name, to secure a partnership debt, conveying for that purpose the partnership effects. There is not, as we have seen, any competent proof of these allegations of the bill, and if there was proof that these slaves were the individual property of E. Dansby, and that the debt to secure which the mortgage was made, was his individual debt, no relief could be had upon this bill as it now stands.

The decree of the chancellor dismissing the bill must be affirmed.

BECKWITH, ET AL. V. BALDWIN.

1. A demurrer to the declaration does not reach the objection that the cause of action is one for which attachment will not lie. The proper mode of presenting that question is by a rule on the plaintiff, to show cause why his attachment should not be dissolved.
2. When an attachment is sued upon a debt not due, the declaration should not be filed until the maturity of the contract.
3. One employed to act as pilot on a steamboat, who is willing, and ready, and offers to act as such, but whose services are refused, may, after the expiration of the term of service, recover the value of his services in *indebitatus assumpsit*, and need not alledge any excuse for not performing the contract on his part.

Writ of Error to the County Court of Mobile.

THE defendant in error caused an attachment to be issued against the plaintiff, upon an affidavit that they were "indebted to him in the sum of \$524 50, of which sum \$74 50 is now (then) due, and the further sum of \$450 will become due on the 1st day of May next, (1846,) and that said Jacob Beckwith, Frank Rodgers, Elisha Rodgers, and Charles Rodgers, are about to remove their property out of the State,

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and that thereby this affiant will probably lose the debt, or have to sue for it in another State." The declaration is entitled of the June term of the county court, holden in 1846, and embraces counts for the following causes: 1. For work and labor done, &c., by the plaintiff about the defendant's business, and alleges an indebtedness on the 1st day of May, 1846. 2. The second count is similar to the first, save only that it alleges an indebtedness on the first day of January, 1846, in sum of \$74 50. 3. This count states an indebtedness on the 1st day of May, 1846, in the sum of \$520 50, "for the work and labor, care and diligence, journeys and attendance, had and done by the plaintiff, in and about the business of the defendants, as a pilot on board the steamer Clermont, of which the said defendants are owners, &c.

From a bill of exceptions sealed at the defendants' instance, it appears that when the cause came on for trial, the defendants moved to quash the writ of attachment, because it issued before a debt had been created; which motion was overruled. The plaintiff then introduced the deposition of J. A. Case, and the defendants objected to the admission of the special contract contained therein; but their objection was overruled, and the contract read to the jury, and is as follows: "Mobile, Dec'r 12, 1845. I do hereby promise to pay Henry C. Baldwin, \$150 per month as first pilot of the steamboat Clermont, from the time that said boat commences to run on the Warrior river until the 1st of May, 1846, provided the said boat does not sink or burn up—then his wages cease, should the boat be lost while running from Mobile to Tuscaloosa.

J. A. CASE, Master
of the Steamboat Clermont.

In the deposition of the same witness there is set out a written contract between himself and the defendant Beckwith, by which the witness was to become the master of the Clermont, to employ boatmen, officers, &c.; and to run it on the Black Warrior river, between Mobile and Tuscaloosa, for the period embraced by the agreement between the plaintiff and witness; unless the boat should be lost, or the contract rescinded as therein provided.

Plaintiff also proved by two other witnesses, that in January, after the hiring took place, and before this suit was commenced, the plaintiff offered to perform service on the Clermont, or on any other boat for the defendants; but they refused to receive his service, or to employ him in any other manner, and he was not afterwards called on by them to act as a pilot, or in any other capacity.

The court charged the jury, that if Case employed the plaintiff for the whole season, being authorized to do so, and the plaintiff was willing and ready to perform his contract, but was prevented by the defendants, he might recover in this form of action, notwithstanding he was discharged by the defendants in January, and rendered no farther service.

Thereupon the defendants prayed the court to charge the jury: 1. That the contract produced was an entire contract, and no suit could be brought until the expiration of the time mentioned therein. 2. That if in such a case as the present a suit might be commenced, it could not be instituted by attachment. 3. That the contract was special and the plaintiff could not recover in this action. All which were refused, &c.

The judgment entry recites that the defendants' demurrer to the declaration was overruled, the cause submitted to a jury, who returned a verdict for the plaintiff for \$532 80 damages, on which judgment was rendered. The assignment of error questions the correctness of the ruling of the county court, in overruling the motion to quash the attachment, in overruling the demurrer, and in charging and refusing to charge the jury.

P. PHILIPS, for the plaintiffs in error, made the following points: 1. The contract is entire, and no action could be maintained upon it, until the expiration of the time for which the plaintiff's services were engaged. True, the plaintiff might have elected to treat the contract as rescinded, but then he should proceed for some special damage, or upon an *indebitatus assumpsit*; in either of which the recovery would be limited to the service rendered, or the damage sustained.

The commencement of the suit before the time when the service was to be performed, had expired, and the filing common counts indicates the election to rescind, and limits the recovery to the damages to that time.

2. The attachment law allows such process to issue "although the debt or demand be not due, and declares the attachment shall be a lien on the property levied on, until the "debt or demand becomes due." This shows that there must be a "debt or demand," though it may be payable at a future time. At the time the suit was commenced, there was no present liability upon the written contract; and as an indebtedness was to depend upon performance, or some after act, it could not be assumed that there was a "debt or demand" to become due afterwards.

3. The act of 1833, which declares that it shall not be required of the plaintiff to file his declaration "before the first term of the court after such action falls due," does not authorize the plaintiff to recover a "debt or demand," which accrues after the attachment issued. By the terms "such cause of action," we are to understand that on which the attachment was founded. The case relied on from 4 East's R. 75, is a decision applicable to the *latitat*, or original writ in the English common pleas. [Foster v. Bonner, Cowp. Rep. 454.]

4. A servant or agent wrongfully dismissed, has three remedies—1. He may sue immediately for a breach of the contract. [Payan v. Gandolfo, 2 C. & P. Rep. 370.] 2. He may treat the contract as rescinded, and sue on a *quantum meruit* for work and labor done. [Planet v. Colburn, 8 Bing. Rep. 14.] 3. He may wait until the expiration of the time for which he is hired, and then sue in *indebitatus assumpsit* for his entire wages. [Gandell v. Ponligus, 4 Camp. Rep. 375; see Arch v. Homer, 3 C. & P. Rep. 349.] If the plaintiff was entitled to recover any thing, it was wages for the service actually performed. [See 21 Wend. Rep. 462; 7 Ala. Rep. 257.]

5. Where a special contract has been performed, so that the liability to pay the money has become absolute, *indebitatus assumpsit* will lie; but if the contract is still open, or is to be performed in future, the count must be framed on the

contract. [Crammer v. Graham, 1 Blackf. Rep. 406; 2 Greenl. Ev. 78; Clemens v. Eslava, 4 Porter's Rep. 504; Hunter v. Waldron, 7 Ala. Rep. 753; Davis v. Ayres, 9 Id. 292; Snedcor v. Leachman, 10 Id. 332.]

6. The contract being for a definite time at \$150 per month, is entire, and no action can be maintained for a part of the aggregate sum without a renunciation of the right to the residue. [Norris v. Moore, 3 Ala. Rep. 676; Givhan v. Dailey, 4 Id. 336; Davis v. Preston, 6 Id. 83.]

J. A. CAMPBELL, for the defendant in error, insisted that the law authorizing an attachment to issue, "although the debt or demand" of the plaintiff was not due, sustains the regularity of the proceeding. [3 Caine's Rep. 323; 4 Mart. Rep. (La.) 517; Serg. on Attach. 44, *et seq.*] But if this be not so, the objection to the attachment was not made in the proper manner, and cannot now be raised. [Jordan v. Hazard, 10 Ala. Rep. 221.]

The statute authorizes the declaration to be filed on the liability as it stands after the maturity of the debt, (Clay's Dig. 333, § 113,) and the objection that the suit was brought before the cause of action accrued cannot avail, where it is necessary to proceed by attachment to secure the plaintiff's rights or give him an effectual remedy. [4 East Rep. 74.]

Under a declaration alledging the performance of an act, it is allowable to give evidence of an excuse for its non-performance. [1 Stew. & P. Rep. 249; 3 Phil. Ev. C. & H's Notes, 116; 1 Stark. Rep. 198; 3 Ala. Rep. 181; 7 Ala. R. 952; 9 Id. 292.]

The question as to the measure of damages is not raised by the bill of exceptions, and the verdict shows that the entire sum agreed to be paid, was not recovered. It is admitted that the plaintiff, if dismissed by the defendants without a cause, is entitled to recover to some extent—upon this admission, no question is raised as to the extent of the recovery.

COLLIER, C. J.—The act of 1833, "concerning attachments," provides that "a writ of attachment may in all cases issue against the property of a debtor legally subject to the

process of attachment, although the debt or demand be not due; which attachment shall be a lien on the property attached, until such debt or demand becomes due, when judgment shall be rendered and execution issued." [Clay's Dig. 56, § 7.]

In *Jordan v. Hazard*, 10 Ala. Rep. 221, it is said that a motion to quash an attachment is not revisable on error, and the regularity of the process cannot be questioned by a demurrer to the declaration; for this would only bring to view the declaration itself. But it was added, the defendant whose estate has been attached for a cause not authorized by law, was not remediless; "and we think the mode adopted in Pennsylvania, by a rule on the plaintiff to show cause why his attachment should not be dissolved, judicious and proper." Our statute uses the term "debt or demand," and requires the plaintiff or his agent "to swear to the amount of the sum due," and as this could not be done where the damages were uncertain, it would seem to follow that an attachment would not lie. But the introduction of the term "demand" into the act, indicates that the legislature did not intend to confine the remedy to those cases where a debt, in the technical sense of the term, existed. *Further*, an attachment is intended to coerce an appearance where the personal service of process cannot be effected, and a reasonable interpretation of the act requires an extension of the remedy to all cases of contract, where by the terms of the contract, or the law acting upon it, the amount due, or the damages resulting from a breach are ascertained. This conclusion is warranted by the considerations we have stated, as well as the necessity from which it will often relieve a party of invoking the extraordinary powers of chancery. [*Weaver v. Puryear & Williamson*, 11 Ala. Rep. 941.] In addition to this, it may be remarked that the act cited, declares "the attachment law of this State shall not be rigidly and strictly construed." [Clay's Dig. 59, § 17.]

It will be observed, that the defendant did not ask a rule on the plaintiff to show cause why the attachment should be dissolved; and if the refusal to quash could be revised, we should be compelled to decide that the motion was rightly denied. The affidavit affirms the indebtedness of the de-

fendant in a sum certain, states how much is due and when the residue will become due, the writ conforms to it; and upon their face the proceedings are altogether regular, so, that if the demurrer to the declaration could reach them, they could not be affected by it. Looking to the affidavit and attachment alone, we discover nothing of which their irregularity can be predicated—they are fully supported by the seventh section of the attachment law.

If the damages claimed by the plaintiff were ascertained by the terms of the contract on which he placed his right to recover, it will follow from the citations we have made, that the remedy pursued is altogether proper. To this question, as well as the adaptation of the declaration to the proof, we will now address ourselves. By a statute passed in 1832, it is enacted, that "It shall not be required of the plaintiff, in any suit by attachment, founded upon a cause of action not due, to file his pleadings before the first term of the court, after such cause of action falls due, and the same may be dated as of the term when filed. [Clay's Dig. 333, § 113.] This provision was doubtless intended to enable the plaintiff to declare upon the cause of action as it exists after maturity of the debt or demand, where an attachment has previously issued, so that he set out his "debt or demand" as past due, instead of becoming due *in futuro*.

In *McLendon v. Godfrey*, 3 Ala. Rep. 181, we said, "if the defendant has prevented a performance, under such circumstances as would entitle the plaintiff to recover as much as he would, had the contract been entirely executed on his part, then perhaps it may be unnecessary to alledge in the pleading any matter of excuse. [5 B. & C. Rep. 638; 2 D. & R. Rep. 357. See further on this point, *Poague v. Richardson*, Litt. Sel. Cases, 134; *Holt v. Cueme*, Id. 499.] So where the plaintiff is prevented from the performance of a verbal contract by the defendant, a recovery may be had on the money counts, in assumpsit, when the damages resulting from a breach are not unliquidated. Accordingly, it has been held, that a contract to pay a gross sum for the teaching of certain pupils for an entire session of a school, if they are taken away without any fault of the teacher, or other occurrence which entitled the parent to consider the contract as

rescinded, the teacher may recover the entire sum agreed to be paid. See also, 1 Chit. Plead. 298 ; 1 East's Rep. 58 ; 11 Id. 285 ; 1 Taunt. R. 12 ; 5 B. & C. Rep. 638.

In Davis v. Ayres, 9 Ala. Rep. 292, it was decided that where there was an express agreement for particular services for a definite time, and the defendant discharged the plaintiff before the time has elapsed, so that he is prevented from performing the services, he must declare on the special agreement. But if the plaintiff does not seek redress until after the time has expired, *indebitatus assumpsit* will lie. See also 1 N. Rep. 330 ; 2 Stark. Rep. 227 ; 2 B. & P. Rep. 582. In the case cited from 9 Ala. Rep. we held, that where one party stipulates with another, to pay him fifty dollars *per month*, for four months, for his services as a clerk in a store, and then refuses to allow the services to be performed, without a sufficient cause, the party engaged as a clerk may immediately commence an action against his employer, and recover not only the damages sustained by the breach of contract, at the time suit was brought, but such as may be developed up to the time of the trial.

If the plaintiff offered to perform his contract, was willing and ready to do so, and the defendant refused to receive his services, there can be no doubt but he is entitled to recover the sum agreed to be paid him. It was competent to have sued upon the refusal of the defendant to allow the plaintiff to enter upon the employment agreed on either by suit instituted in the ordinary form, or by attachment. This point is too clearly and unquestionably settled by our own decisions, and the statute regulating proceedings by attachment, to require a further remark in its support.

In respect to the declaration, we have seen that the statute does not require it to be filed, until after the expiration of the period when the service was to have been rendered ; and that after that time the plaintiff, upon showing that he was, without, cause prevented from performing his part of the contract, may recover for work and labor, &c. The declaration is unobjectionable in itself, and the demurrer to it was properly overruled. No question is raised upon the record as to

the authority of Case to bind the defendant by the contract which he entered into with the plaintiff. That was doubtless a conceded point, or satisfactorily proved.

The record does not bring to our view an available error, and the judgment of the county court is therefore affirmed.

SIDNEY v. WHITE.

1. A negro who, by the law of the place of his birth, is entitled to his freedom when his mother arrives at a particular age, will be entitled to his freedom in this State, though sold as a slave, and brought here before that event happened.
2. Where a female slave is entitled to freedom when she arrives at a particular age, her children born in this State, before the event happens, are slaves.
3. Where a negro held in this State as a slave, sues for his freedom, if his right to freedom depends upon the law of the place of his birth, the law must be proved as a fact upon the trial of the cause.

Error to the Circuit Court of Limestone.

THE plaintiff in error, a colored man, sued for his freedom, and upon the trial of the cause, proved, that by the will of William Patterson, of the State of Delaware, a negro slave woman named Phillis, was bequeathed her freedom, and providing that she should remain in servitude, until she became thirty-one years of age; and that such a will was legal in Delaware. That she was carried to the State of Tennessee during the term of her servitude, and that whilst there, and before she attained the age of thirty-one years, she gave birth to the plaintiff, who was sold to the husband of the defendant, who was an innocent purchaser, and that the defendant has held him as a slave, since her husband's death.

The court, at the instance of the defendant, charged the

jury, that if they believed the plaintiff was born before his mother attained the age of thirty-one, he was born in slavery, and was not entitled to his freedom. To this charge the plaintiff excepted, and this is the matter now assigned as error.

W. COOPER, for plaintiff in error.

In the case of a life estate and a remainder man a child born pending the life estate goes to the ulterior legatee. [Wheeler's Law of Slavery, 23; Erwin, and others, v. Kilpatrick, et al. 3 Hawkes' N. C. Rep. 456; Tims v. Potter, Martin's N. C. Rep. 22; Preston v. McGaughy, Cook's Rep. 113; Harris v. Clarissa, 6 Yerger's R. 227.] This last case is in full, and on review of all the cases relied on by counsel for defendant in error. [Wheeler's Law of Slavery, 34, section 10; Jacob v. Sharp, Meigs's Rep. in Ten. '38, '39, p. 114; Harrell v. George, 3 Hump. R. 255; Isaac v. Frost's Ex'r, 6 Randolph, 652.]

McCLUNG, contra.

A testator directs that a female slave shall be free at a certain period—her children born before that period, and after testator's death, are slaves. [Ned v. Beal, 2 Bibb, 298.]

A, by will, bequeathed her slave Mary to B, for life, and that at B's death, Mary should be free. During the life of B, Mary has issue—they are slaves. [Chew v. Gary, 6 Harris & Johnson, 526.]

A slave who has a deed of emancipation, under which she is to be free at the grantor's death, is in the meantime a *statu liber*, and children born from her, meantime, are slaves. [8 Martin's Lou. Rep. 218; Law of Slavery, 206; to the same effect, 4 Leigh, 252; 10 Id. 277; 6 Rand. 652.]

ORMOND, J.—Our law recognizes the existence of negro slavery, and protects the owner of such property in its enjoyment. But the law, and the policy of the government, alike forbid the creation of the state, or condition of slavery, or involuntary servitude. No one can by any act of his convert a free man into a slave; and if by birth, or by the law of his domicil, an individual is free, or entitled to freedom at a cer-

tain time, or on the happening of a certain event, the right will follow him every where. It results necessarily from these premises, that if the plaintiff was a free man by the laws of the State of Tennessee, the place of his birth; or if at a subsequent period, by that law, he would have been entitled to freedom, on his mother becoming thirty-one years of age, pursuant to the will of her former master, he cannot be deprived of that right by being sold as a slave in Tennessee, and as such brought to this State, either before, or after the contingency happened, which entitled him to freedom.

The first point to be considered therefore, is, whether the plaintiff was entitled to freedom, on his mother arriving at the age of thirty-one years. This question appears to be settled in a large majority of the slaveholding States, where it has arisen, against the right of one so circumstanced, to freedom. The solution of this question, depends upon the ascertainment of the *status* of the mother, at the time of the birth of the child. The bequest by which this right is asserted, is thus stated in the bill of exceptions: "A negro woman slave, named Phillis, was bequeathed her freedom, providing that she should remain in servitude, until she should become thirty-one years of age." Which is precisely equivalent to a declaration, that she should be entitled to her freedom, when she arrived at the age of thirty-one, and by necessary consequence, until the event happens, she continues a slave. We say by necessary consequence, for there is no middle ground known to our law, between freedom and slavery. Until the event happened, upon which the mother was entitled to her freedom, she continued a slave, subject to all the disabilities of that condition, and as the condition of the mother ascertains the condition of the child, according to the maxim of the civil law, *partus sequitur ventrem*, which has been adopted in this, and the other slave States, it follows that the child born whilst the mother was a slave, is also a slave. He is not elevated to the condition of a free man, by the subsequent happening of an event which gave his mother freedom, in virtue of a will made previous to his birth, any more than he would be, by her manumission made subsequent to it. The law has been thus held in *Maria v. Surbaugh*, 2 Rand. 228; *Crawford v. Moses*, 10 Leigh, 277; *Catin v. D'Orge-*

noy's heirs, 8 Mar. Lou. 218; Chew v. Gary, 6 H. & J. 526; Ned v. Beall, 2 Bibb, 298.]

In the State of Tennessee, as we learn from the reported decisions of that State, a different rule prevails, and it is there held, that one in the condition of the plaintiff, is entitled to his freedom, when his mother becomes free. The precise question here presented, arose in *Harris v. Clarissa*, 6 Yerg. 227. There, a will was made in Maryland, by which freedom was given to certain slaves, when they arrived at the age of twenty-five, and it was held that the children of the females, born before that period, were entitled to freedom when their mother attained to that age. The same decision was made in *Hartsell v. George*, 3 Hump. 255, and again in the recent case of *Abram v. Dambro*, decided November, 1844. From this exposition of the law of Tennessee, the place of the birth of the plaintiff, it is evident if he had remained there, he would have been free when his mother became thirty-one years of age, and this right, as already shown, will follow him wherever he may be carried, and whether he was sold as a slave, before, or after the happening of the event, which entitled him to freedom, if the question in the aspect we have just considered it, was presented upon the record; but it does not appear from the record, that there was any proof offered of the law of the State of Tennessee.

That the law of another State, whether written, or unwritten, where it affects a contract, or is necessary to the ascertainment of any question submitted to, and to be determined by a jury, must be proved as a fact, is a question too well settled to require the citation of authority to support it. The manner of proving the unwritten law of a State, by the production of the accredited reports of its judicial decisions, is fully considered in *Inge v. Murphy*, 10 Ala. 805.

It is very clear that the law of the State of Tennessee, ascertaining the *status* of the plaintiff, was a fact necessary to be known by the court, and jury, to enable them to ascertain, and determine, whether the plaintiff was a slave or a free man. From the general law, as shown in the preceding part of this opinion, the plaintiff must be considered a slave, even in those countries where manumission by will is allowed, and nothing was shown to the court and jury, repelling this in-

ference. The charge of the court, therefore, upon the testimony before it, was strictly correct, the only facts in evidence, being the will, and the birth of the plaintiff in Tennessee, before his mother's right to freedom attached. The law of Tennessee being a fact, this court cannot take notice of it, unless it appeared from the record, it was in testimony before the jury, and some action of the court predicated upon it, so as to present a question, which this court could consider in its appellate capacity.

There being no error shown upon the record, the judgment must be affirmed.

WORRELL v. THE STATE.

1. It is not necessary that an indictment for an offence created by statute, should pursue the very words of the act. The act inflicting a penalty on persons, "who buy, sell, or receive *from* any slave, any commodity," &c. is violated, by selling to a slave without the consent of the master.

Writ of Error to the Circuit Court of Marengo.

W. M. BROOKS, with whom was BYRD, for the plaintiff in error, insisted that the indictment did not charge an offence known to the law, and cited Clay's Dig. 437, § 8; 4 Porter, 410; 1 Bailey's Rep. 144; 2 Hill's (S. C.) Rep. 459; 6 S. & R. Rep. 5.

ATTORNEY GENERAL, for the State.

COLLIER, C. J.—The plaintiff in error was indicted for selling to a slave "a certain commodity, to wit: eight gallons of whiskey, without having first obtained the leave or consent of the master, owner or overseer of said slave, either

verbally or in writing for that purpose, contrary to the form of the statute," &c. The statute on which this indictment is founded is in the following words: "Every person who shall buy, sell, or receive from any slave any commodity of any kind or description, without the leave or consent of the master, owner or overseer of such slave, verbally or in writing, expressing the articles permitted to be sold or bartered, first obtained, shall, on conviction, be fined in a sum not less than ten, nor more than one hundred dollars, and may be imprisoned not more than three months." [Clay's Dig. 437, § 8.]

It is insisted that no conviction can be sustained under this act for selling to a slave, and that as an indictment should pursue the words of the statute on which it is founded, no indictment could be framed for such a charge, that would not be defective. The statute, it is true, would have expressed its meaning with more precision if the preposition "to," had followed the word "sell." But "from" cannot be regarded as an adjunct of "sell"—it must be applied to "buy" and "receive" only. Thus adjusting the terms employed, and so far as the present case is concerned, the act may with perfect propriety be thus read, "every person who shall sell any slave any commodity," &c. This conclusion is not the result of artificial or technical reasoning; but the reasonable and natural import of the language employed, and does not violate the rule which requires penal statutes to be strictly construed; but is in perfect harmony with it.

It is a mistake to suppose that an indictment should always pursue the very words of the statute, or that an indictment thus framed is, as a matter of course, unexceptionable. See *Turnipseed v. The State*, 6 Ala. R. 664, in which the law on this point is considered. But it will perhaps follow from what has been already said, that an indictment which follows the act in question will be good; if however, it be otherwise, we have seen that the indictment is sustainable, as the act makes the fact charged an offence.

There is no error in the record, and the judgment is therefore affirmed.

BURT v. CASSETY.

1. Possession of land under a purchase, is notice to a creditor, and will prevent the *lien* of his judgment against the vendor from attaching upon it, though the deed may never have been recorded.
2. A deed drawn by an attorney, for land, by the direction of the vendor, is sufficiently delivered to the vendee, though not present, if left with the attorney for the purpose of registration, or, after its execution, taken by the vendor, for the purpose of being handed to the clerk to be registered.
3. A party may go into equity, to remove a cloud which hangs over his title, either by an actual, or threatened sale of the land to another.
4. A judgment creditor is improperly made a party to a bill filed to perfect a title to land, who has never attempted to subject the land to the payment of his judgment.

Error to the Chancery Court of Benton.

THE bill was filed by the plaintiff in error, and alledges, that in the year 1839, she purchased of her son Oswald E. Burt, one hundred acres of land, which is described, for which she paid him \$1,250. That the son represented to her at the time, that he had a good title to the land, holding the fee simple title, and that she was ignorant of any incumbrance upon it. That she is under the belief, and so charges, that her son made a conveyance of the land to her by deed, but that after diligent search, the deed cannot be found and she therefore charges that it is lost, and not in her power to produce. That she went into possession under the purchase, and has continued in possession from that time, exercising ownership over it, claiming the land, &c.

That one S. M. Price, for the use of Cassety, on the 23d October, 1843, obtained a judgment against Oswald E. Burt, for \$555, besides costs, in the circuit court of Benton county, upon which execution has issued, and been levied on the said land, which is advertised for sale by the sheriff.

It is also charged in the bill, that two other persons, Thos.

A. Walker, and William Raiford, have obtained judgments against Oswald E. Burt, since the sale of the land to complainant. These judgments are particularly described. All these persons are made parties to the bill. The prayer of the bill is, that Price, and Cassety, be perpetually enjoined from selling the land in satisfaction of their judgment against O. E. Burt, and that the judgments of Walker, and Raiford, be decreed not to be a *lien* on the land, that they be perpetually enjoined, &c.

Walker and Raiford answered the bill, admitting that they had obtained judgment against O. E. Burt, but denying that they had issued execution against the land, and disclaiming all interest in the question, prayed to be dismissed. Cassety answered the bill, and denied all knowledge of the purchase of the land, as alledged in the bill, but states, that from information, and belief, it was a mere parol contract. That if a deed was written for said land, it was at the request of Oswald, and was never delivered to the complainant. That whatever interest the complainant may have had in the land she had relinquished to one William P. Chilton, before the filing of the bill. The answer contains a prayer that it may be considered as a cross bill, and the complainant and Chilton be required to answer, &c., and also a demurrer to the bill, for want of equity.

The complainant answered the cross bill, and re-affirming the matters alledged in the bill, denies all knowledge of the consideration of the note, the foundation of the suit, and admits that her son, by her authority, sold the land to Chilton, but that she has not made him a deed to it, because she has not been able to find the deed from her son Oswald to her. She further answers, that the title to the land was made to her by her son Oswald, and deposited with her agent. That O. E. Burt, her son, purchased the land from one Robinson, and obtained from him a deed in fee, without any knowledge on his part, as she believes, of any incumbrance. She demurs to the cross bill, for several enumerated reasons. O. E. Burt, and W. P. Chilton also answered the bill, in substance the same as the preceding.

The testimony which was taken, establishes very satisfactorily, the sale to the complainant, the delivery of possession

to her, the payment of the purchase money, and the execution of a deed for the land, by the vendor, and that it was left with the attorney who drew it to be recorded, but was not in fact recorded. Upon this proof, the chancellor made a decree, dismissing the bill, which is the matter now assigned as error.

CHILTON, McLESTER, and MORGAN, for plaintiff in error.

1. An equitable title will prevail against creditors or purchasers of one having only a naked legal title. An equitable title need not be recorded. And possession is equivalent to registration of a title deed. And a court of equity will interfere to quiet and perfect an equitable title against the vendor and his creditor. [Morgan, et al. v. Morgan, et al. 3 Stew. 383; Harris, et al. v. Carter, Adm'r, et al. Ib. 233; McGee v. Andrew and Wiley Eastis, 5 Stew. & P. 426; Toney v. Moore, 4 Ib. 347.]

2. If there was in fact no deed made to the complainant, she clearly has a right to a specific performance of the contract; her possession and improvements take the case out of the statute of frauds. [Meredith v. Naish, 3 Stew. 207; Toney v. Moore, *supra*.]

3. The jurisdiction of equity is sustainable whether there was a deed made to Mrs. Burt or not—if the deed was not made, she claims a specific performance, and injunction, to perfect her title and prevent a cloud being cast over it by sheriff's deed. If the deed was made and lost, she may well come into equity to establish and protect her interest. [Atkison v. Leonard, 3 Bro. Ch. Rep. 218; Walmsley v. Child, 1 Ves. 341; 1 Story's Eq. 257, § 254, and cases there cited; Fonblanque's Eq. 33, 34, 35, and cases there cited.]

4. If a sale had been already had, and a sheriff's deed made the complainant could have her bill in equity to set it aside and clear her title. [Rumph v. Abercrombie, at this term.] Will not equity interpose to prevent a sale, which it would set aside if made?

5. The case of Green v. Harrison, 7 Ala. Rep. 585, is not applicable here, for that was a levy on personal property, and under the statute there is a perfect remedy at law, by trial of the right of property, but there is no such remedy for the

claimant of real estate—he must suffer a sale, and wait the good pleasure of the purchaser to see him, before he can have his rights settled, and by such delay the purchaser may suffer great injury by the incumbrance of a sheriff's deed.

6. The case of *Daniels v. Sorrell*, 9 Ala. 436, relied on by the chancellor does not conflict with the case of the plaintiff in error. In that case the day of registration had passed before the rendition of the judgment, till after which the plaintiff in execution had no notice of the unregistered deed, and upon that point the case turned. In the case at bar, the plaintiff in the judgment had actual notice of Mrs. Burt's title by her possession and improvement of the land, from long before the rendition of his judgment to the date of the levy. *Mallory v. Stodder*, 6 Ala. Rep. 801, the other case relied on by the chancellor, settles no question contrary to the principles insisted on for the plaintiff in error.

T. D. CLARKE, contra.

The complainant alleges that she has a *legal title* to the land in controversy, that the land has been levied on by virtue of an execution of Cassety against *her vendor*, and *she fears* two other judgment creditors of her vendor will issue executions and levy on the same land. The judgments are subsequent in date to her deed; under these facts she seeks injunction of the levy of the *fi. fa.* issued, and of those, the issuance of which is apprehended, on the land.

1. Under such a state of facts, complainant's remedy is plain, adequate, and complete at law; and the bill cannot be entertained as a bill of peace, because the parties are not sufficiently numerous, and complainant has not established her right at law. [*Gunn v. Harrison*, 7 Ala. R. 585; 3 *Daniels* Ch. Pr. & Ev. 1902.]

This case is unlike *Morgan, et al. v. Morgan, et al.* 3 Stew. 383—there complainant's title was equitable only—*three* lots were involved—five different creditors were seeking to subject the property—*here* complainant has a legal title—only one creditor is proceeding, or threatening to proceed, and there is but one tract of land.

2. The conveyance made from O. E. Burt to complainant is *void* for want of registration, as against purchasers and creditors, and this leaves complainant without title to the land as against Cassety, a *bona fide* creditor of O. E. B. [Clay's Dig. 256, § 8.]

The authority from 3 Stew. (Morgan, et al. v. Morgan, et al.) holding that possession by the vendee was equivalent in its effects to the registration of his deed, was made under the act of 1832, (Clay's Dig. 154, § 18,) which contains a restriction of the provisions of the act to cases where there was no notice. That restriction is not found in the act of 1828. The deed being void for want of registration, no notice, either actual or constructive, can impart any validity whatever to it, and she is not entitled to the benefits of an equitable title with constructive notice to adverse parties.

3. The allegation of the loss of the deed, under the circumstances, will not of itself give a court of chancery jurisdiction. [1 Story's Eq. 97 to 105.]

4. If plaintiff in error rely upon the ground that the contract of her purchase from O. E. Burt was unexecuted, and no deed was made, then we say that Cassety and other judgment creditors were improper parties.

5. The allegations of the bill are not positive, but too vague and uncertain. [Story's Equity Pleading, 19, 24, 207, 208.]

ORMOND, J.—The merits of this case lie in a very narrow compass, and will require but a brief consideration. It is, as admitted by the chancellor, clearly shown by the proof, that the complainant purchased the land in question from her son, who then held the legal title by conveyance from one Robertson. That she paid the purchase money, and was put in possession, which she has retained ever since. It is also proved, that the son conveyed the land to his mother by deed. O. E. Burt, the son, states in his deposition, that by his direction, W. H. Estill, an attorney at law, drew the deed, which he executed, and left with Estill to have it recorded. Estill on his examination, says, that the deed may have been left with him; but he thinks it was handed to the vendor, to be carried to the clerk's office for re-

gistration. In our judgment, these facts clearly establish a delivery of the deed to the complainant. It is of no importance whatever, that the vendee was not present when the deed was made. She is presumed to assent to it, as it is for her benefit. When the deed was executed, the vendor states he left it with Estill to be handed to the clerk for registration. Estill thinks, the vendor after its execution, took it himself for the purpose of having it registered. In either aspect it was a delivery of the deed, and the title of the vendee, as against the vendor, became perfect.

The deed was never recorded, and was therefore inoperative, as against subsequent purchasers, and creditors without notice. Actual notice of the execution of the deed, is not brought home to the creditor, who subsequently obtained a judgment against the vendor; but the possession by the vendee, of the land, and the exercise of ownership over it by her, is an implied notice, quite as effectual as the implied notice from a registry of the deed, and as potent in its effects as an actual notice of the existence of the deed, before the judgment was obtained.

Our registry acts place creditors, and subsequent purchasers, upon the same footing, as to unregistered deeds; but the term creditor in the statute, does not mean creditors at large of the grantor, but such creditors as by obtaining a judgment against him, have acquired a *lien*, without notice of the existence of the deed, either express or implied. [Ohio Life Insurance & Trust Co. v. Ledyard, 8 Ala. 866; Daniel v. Sorrelles, 9 Id. 436.] That possession by the vendee, is constructive notice of the conveyance, so as to defeat a subsequent purchaser, and prevent the judgment creditor from obtaining a *lien*. [See Smith v. Zurcher, 9 Alabama Rep. 208; Hanrick and Powell v. Thompson, Id. 409; Farnsworth v. Childs, 4 Mass. 641; Priest v. Rice, 1 Pick. 164.]

It results from this view, that as the judgment creditor had, by the possession of the complainant, constructive notice of her title, he acquired no *lien* upon the land, in virtue of his judgment.

It is not necessary to consider, whether it would make

any difference whatever, if the title of the complainant was merely equitable. It is perfectly clear it would make no difference in the case of a subsequent purchaser, who would be as much affected with notice of an equitable, as of a legal title. [Clay v. Moore, 7 Ala. 742; Williamson v. Branch Bank at Mobile, Id. 920.] And as already observed, purchasers and creditors, are by our registration acts, placed on the same footing.

There was however, no pretence for making Raiford, and Walker parties to the bill. Their whole offence consisted in having obtained a judgment against Oswell E. Burt, but they did not attempt to levy it upon this land, or claim a *lien* upon it. As to them the bill was properly dismissed.

The objection that the court had not jurisdiction, because the legal title was in the complainant, and she could have successfully defended at law, is not tenable. The established doctrine of this and other courts is, that a party may go into equity, to remove a cloud which hangs over his title, either by an actual or threatened sale of the land, as the property of another. This question was considered by us at length in Lyon v. Hunt, 11 Ala. Rep. 307, and see also, Pettit v. Sheppard, 5 Paige, 501.

We have not considered it necessary, or proper, to inquire into the propriety of the informal cross bill, as it exerts no influence whatever in the cause.

With the exception heretofore noticed, of the defendants Walker and Raiford, the decree must be reversed, and a decree be here entered, perpetually enjoining the defendant Cassety, from levying his judgment upon this land.

THE BRANCH BANK AT DECATUR v. DONELSON,
ADMINISTRATRIX.

1. The absence of an administrator from the State, will not prevent the bar of the statute of non-claim, after it has commenced running. Whether the removal of the administrator from the State, would not justify the revocation of his authority, *quere*.

Writ of Error to the County Court of Lauderdale.

THIS was an action of assumpsit at the suit of the plaintiff in error, against the defendant, upon the indorsement of her intestate, on a bill of which he was the payee. Among other pleas, the defendant pleaded that the claim sued on was not presented to her within the time prescribed by the statute; to which the plaintiff replied, that the defendant removed beyond the limits of this State within less than eighteen months after the grant of administration to her, and immediately on her return, this suit was instituted. The defendant demurred to the replication, and her demurrer was sustained. Judgment being rendered for the defendant, the plaintiff has sued a writ of error, and insists that the county court erred in the decision of the question of law arising upon this statement of facts.

J. A. NOOE and J. S. KENNEDY, for the plaintiff in error.

L. P. WALKER, for the defendant in error.

COLLIER, C. J.—By a statute passed in 1815, it is enacted that “all claims against the estates of deceased persons shall be presented to the executor or administrator, within eighteen months after the same shall have accrued, or within eighteen months after the passing of this act, or within eighteen months after letters testamentary or letters of administration shall have been granted to said executor or administrator, and not after; and all claims not presented within the

time aforesaid, shall be forever barred from a recovery : provided, that the provisions of this section shall not extend to persons under age, *femes covert*, persons insane, or *non compos mentis*, to debts contracted out of this State, nor to claims of heirs or legatees claiming as such." [Clay's Dig. 195, § 17.] The terms of this statute are emphatic, and impose upon the creditor the necessity of presenting his claim to the executor or administrator within eighteen months after letters testamentary or of administration shall have been granted ; unless he can bring himself or his claim within some one of the exceptions contained in the proviso. It is not pretended that the presentation of the plaintiff's demand is excused by the terms of the act, but insisted that as this is a statute of limitations, the time of the absence of the administratrix beyond the State cannot be computed in her favor.

It has been so often ruled as to be now a legal axiom, that where the statute of limitations has commenced running, no subsequent disability can arrest its progress. [1 Johns. Rep. 165 ; 1 Bibb's Rep. 257 ; 3 Conn. Rep. 395 ; 6 Munf. Rep. 352 ; 6 Johns. Ch. Rep. 372 ; 4 How. Rep. 31 ; 8 Ala. Rep. 253 ; Kirby's Rep. 299.] We must look to the exceptions which the legislature have prescribed, and the inhibitions it has imposed upon the creditor's right to sue, as furnishing the only restrictions upon the generality of this rule. If a statute enacts that a certain form of action, or liability shall not be sued after a limited period, the withdrawal of the debtor from the State after the cause of action had once accrued, would not for the time being stop its continued operation. It is only because the act of limitations declares the time of absence shall be deducted, that the deduction is allowed in favor of the creditor. But the statute of non-claim makes no such provision ; and this court cannot, without assuming a power which appropriately pertains to another department of the government, decide that that enactment was suspended in its effect during the absence of the administratrix in another State. The pleadings indicate she was (as indeed she should have been) in the county from which she derived her authority, when administration was granted. Assimilating then, the act in question to the statute of limitations, and it is clear that it began to run ; and the plaintiff not bringing it

within any recognized exception, it continued to run on, until it consummated the bar.

Whether the orphans' court should commit the administration of an estate to a non-resident, or whether the removal of an administrator abroad would not justify the revocation of his authority, are questions which do not arise. So long as the grant of administration continues in force, the defendant must be regarded as the legal representative of the estate. As she resided abroad, it may be that less strictness would have been required in order to make the presentment of a claim against the estate available—and perhaps a notice communicated by mail, would in such case be *prima facie* sufficient. [5 Smedes & M. Rep. 651.] But we must determine the cause as it is presented by the record. Thus considering it, the ruling of the circuit court is agreeable to law; and its judgment is consequently affirmed.

JOHNSON v. BURNETT'S ADM'R.

1. McD made a verbal contract with G., for a tract of land, and went into possession, by which he agreed to discharge certain judgments against G., and pay the residue to McI. After this, the judgment creditor levied on the land, and before the sale J., a creditor of G., caused an attachment to be levied upon it. The land was sold, and purchased by McD., the judgment discharged, and for the residue of the purchase money, E. A. & Co. also judgment creditors of G., sued out garnishee process, and summoned McD., who answered, disclosing the above facts, whereupon an order was made, that McI. and J. appear and contest plaintiff's claim—Held, first, that an attachment could be levied on the land by J., after the levy of an execution upon it—second, that the attachment of J. gave him a right to the residue, in the hands of the garnishee, superior to McI., whose title was derived from the verbal promise of the garnishee, made prior to the purchase of the land—third, that J. was properly summoned under the act, requiring all persons who have notified the garnishee, that the debt in respect to which he has been garnisheed, has been transferred, or assigned

to them. to be summoned, to contest with the plaintiff, the validity of such transfer—fourth, that any person summoned under this statute, and aggrieved by the judgment of the court, may prosecute a writ of error—and, fifth, that the judgment of E. A. & Co., being posterior to the levy of the attachment of J., would be postponed to it.

Error to the Circuit Court of Wilcox.

E. L. ANDREWS & Co. having obtained a judgment against William F. Gee for \$1,808 17, besides costs, made the necessary affidavit, and obtained process of garnishment against F. K. Beck, administrator of S. Burnett, and John R. McDowell, as debtors of Gee.

McDowell appeared, and answered in writing, in substance, that in February, 1845, he made an agreement to purchase certain lands of Gee, for which he was to pay \$2,250. That in discharge of this debt, he was to liquidate two judgments against Gee. One in favor of the B. Bank at Mobile, for \$235, or \$240, and one in favor of the Branch at Montgomery, for \$700 or \$800. That he held Gee's note for about \$300, and the residue of the purchase-money was to be paid to one James H. McIlvaine. That after this agreement, the land was levied on by an attachment, at the suit of one Ephraim O. Johnson, against Gee, and that he then declined to have any thing more to do with the land.

The land was also levied on by S. Burnett, the marshal, by virtue of an execution in favor of the B. Bank at Mobile, against Gee, and sold, except forty acres, in April, 1845, and purchased by garnishee, for \$1,701, for which he executed his note to Burnett, which is now in the hands of Beck, his administrator. That the note is entitled to a credit of \$431, which he paid to Burnett. Has been informed, that Gee has given an order on Burnett, in favor of McIlvaine, for the residue. This writ of garnishment was executed on the 20th February, 1846.

Upon the coming in of this answer, an order was made that Johnson and McIlvaine appear and contest plaintiff's claim.

The issues were made up by Andrews & Co. setting out the writ of attachment, the answer of the garnishee, McDowell, and conclude by an averment, that the money in his hands, is subject to the satisfaction of their judgment.

Johnson filed a replication, setting out that he caused an attachment to be levied against Gee, which was executed on the 5th March, 1845, on certain lands of Gee, which are described, and which are the same lands afterwards sold by the marshal, as set forth in McDowell's answer, for the sum of \$1,701, and avers that after the discharge of the judgment in favor of the Bank, there remained in the hands of the marshal \$1,360 10, and that the marshal had notice of the levy of the attachment on the same lands. He further avers, that at the September term, 1846, of the circuit court of Wilcox, he recovered a judgment against Gee, in his attachment suit, for \$1,524 49, besides costs, and insists that as the levy of his attachment was prior to the service of the garnishee process, he is entitled to the money in the hands of the garnishee.

To this replication, Andrews & Co., and McIlvaine demurred.

McIlvaine also filed a replication, alledging in substance, that previous to the levy of the bank executions, an agreement had been entered into between Gee, and McDowell, for the sale of the land, by which the latter agreed to take up a note of the former, to which McIlvaine was a surety, and which was to be taken as part of the purchase money. That thereupon he, McIlvaine, agreed to give McDowell time for the payment of the money, and the latter took the possession of the land, and exercised acts of ownership over it, under the agreement, and before the levy of the attachment.

That shortly after, McDowell hearing of the *lien* of the judgment, of the bank, preferred that the title to the land should come through the marshal, that he should sell the land, and it was thereupon agreed, between Gee, McDowell, and McIlvaine, that if McDowell became the purchaser, the residue of the purchase money, after satisfying the bank, should be applied to the payment of the note. The replication then avers the sale by the marshal, the purchase by Mc-

Dowell, and the balance still due in his hands, as set out previously, and concludes by averring, that his *lien* attached, immediately upon the sale by the marshal, which was previous to the time that the garnishment was issued, or served, and that therefore his *lien* is paramount to that of Andrews & Co.

McDowell filed an amended answer, in which he states that he refused to take Gee's title to the land, but agreed with Gee, that if he should become the purchaser of the land for a less sum than \$2,250, he would pay McIlvaine, for Gee, the amount which he had agreed to pay him. In answer to a question put to him, he said he went on the land to a gin house, raked up the cotton seed, and fenced it in for his own use, before the levy of the execution, or the attachment. That this was done by him under the agreement. There was no writing setting forth the terms of the agreement, and that he declined to take the title of Gee, because he preferred to take the sheriff's deed.

Johnson took issue on the plea of McIlvaine, and relied on the statute of frauds, with leave to give any evidence establishing fraud in fact.

The court sustained the demurrer of the plaintiff to the replication of Johnson, and submitted to the jury to determine, whether Andrews & Co., or McIlvaine, had the superior *lien* to the funds in the hands of the garnishee, and the court rendered judgment accordingly.

Johnson now assigns for error, the judgment of the court on the demurrer to his replication.

SELLERS, for plaintiff in error.

Although the bank marshal had levied the executions in favor of the bank, one day previous to the levy of his attachment on the same lands, the title of the defendant, Gee, was not thereby divested. That the right which the bank marshal acquired by his levy, gave to him a special property only in the land, and this for the sole purpose of enabling him to sell so much as was necessary to satisfy the executions in his hands. But notwithstanding the levy by the marshal, the general property, as well as the title to the land levied upon, remained in the defendant, Gee—clogged it is true, with

the lien created by the levy, and so it would be if, instead of the levy, (being real estate,) a judgment only had been rendered. [Atwood v. Pierson, 9 Ala. Rep. 658; Jackson v. Gewin, Ib. 116.]

The legal title to the lands remained in Gee, notwithstanding the levy by the marshal, and he could have sold and transferred his title to a third person, clogged however with the levy. And if this be so, then certainly the sheriff could levy the plaintiff's attachment on the same land. And if he could levy an attachment under the circumstances, then it would seem clear that the plaintiff, by virtue of the lien created by the levy of his attachment on the same lands would be entitled to the excess of the monies in the hands of the marshal, after the satisfaction of the executions levied by him. If the marshal had sold only enough of the land to pay the executions levied by him, I apprehend, that either plaintiff's right to sell the residue to satisfy the judgment in his attachment suit, would not admit of question; and if this be so, is he not equally entitled to the excess of the monies arising from the sale of said land in the hands of the marshal, after paying the executions levied by him.

There is a material distinction between the levy of an execution upon real estate and personal property. In the case of real estate, the property taken being incorporeal and intangible, it could not be known, whether it was attached or not, and it would be unjust that a creditor who had taken the measures prescribed by the statute, in making his attachment, should be defeated of his security, because in the event it should turn out that another officer had taken the same measures of which no public notice had been given, or was required to be given. [Denny v. Hamilton, 16 Mass. 405.]

In the case of *personal property* attached or levied on, another creditor who would make a second levy or attachment, must do it by the same officer who made the first, because he has the possession of the property, and the creditor therefore knows to whom to deliver his writ. [Denny v. Hamilton, *supra*.]

In this case it is insisted, that the marshal being notified of the levy of the plaintiff's attachment before the sale of said land by him, and being also notified of the levy thereof at the

time of the sale, is bound in law to hold the excess of the monies arising from said sale, after paying the executions then in his hands, entitled to priority over the levy of plaintiff's attachment, or so much as would satisfy the plaintiff's judgment obtained in his said attachment suit as a trustee, and that the plaintiff might well maintain an action at law against him, to recover said monies.

S. G. COCHRAN and W. COCHRAN, for McIlvaine.

1. Will a writ of error lie upon a proceeding of this kind, where there are three sets of independent actors, and the jurisdiction, if any, is the incident of a judgment, and authorized by statute merely, in a course unknown to the common law.

2. The proceeding as to Johnson is irregular and unauthorized by the statute. He is an attaching creditor; he is not in any sense an assignee in the meaning of the statute, whether as an assignee in fact, or by intendment of law. [Clay's Dig. 63, § 39.]

3. The land having been levied upon by the marshal under executions in favor of the Branch Bank at Mobile was not subject to a subsequent levy under an attachment in favor of Johnson, issued out of the circuit court of Wilcox. [Hagan v. Lucas, 10 Pet. 400.]

ORMOND, J.—The demurrers of Andrews & Co., and McIlvaine, to the replication of Johnson, makes it necessary to examine the relative merit of the several claimants to the fund in the hands of the garnishee.

If the attachment could be levied upon the land, after the levy of the execution in favor of the bank, a matter which will be hereafter considered, it is obvious the right of Johnson, the attaching creditor, is superior to that of Andrews & Co., assuming as appears to be the fact, that their judgment against Gee, was not obtained till after the levy of the attachment. Having no *lien* on the land, in virtue of their judgment, they must rely on the service of the garnishee process, which was not until nearly a year after the levy of Johnson's attachment: it follows, that the *lien* acquired by the attach-

ment being prior in time, is superior to the *lien* acquired by the garnishment.

To determine the priority of right, between the attachment of Johnson and the *lien* asserted by McIlvaine to the fund in the hands of the garnishee, we must look to the answer of the latter, which not being controverted, must be considered as true. The substance of the answer, is, that he agreed verbally with Gee for the purchase of the land, for a price stipulated, and after discharging certain debts, to pay the residue over to McIlvaine, who was bound as surety for the payment of a debt for Gee. He declined however, to take the title from Gee, but was to receive a title from the marshal, who, subsequent to the agreement, had levied on the land at the suit of the bank.

The attachment having been levied on the land, previous to the sale by the marshal, the right of the attaching creditor must be superior to that of McIlvaine, unless he can call to his aid the parol agreement of McDowell the garnishee, by which he promised to pay him the surplus of the purchase money, after satisfying the bank debt, in the event he became the purchaser of the land at the sale by the marshal. It appears to us very clear, that a conditional promise of this kind will not create a *lien*, which would override an actual *lien*, created by the levy of the attachment, before the contingency happened upon which the promise was to attach. If it was in the power of the parties to make a contract like this, which would prevent the creditors of Gee from acquiring rights in the mean time upon the property, or its proceeds, it is very clear from the answer of the garnishee, that no such contract was intended to be made by him. This is shown, first, by the fact that there was no written contract, and consequently, as it related to land, there was no valid obligation on either party. Second, that his promise was contingent, depending on his purchasing the land. His obligation therefore to perform this contract, did not arise until the contingency happened, and if in the mean time, by the act of a creditor of Gee, and by operation of law, another person became entitled to the funds in his hands, he is discharged from performing it, because, by operation of law it has become impossible to perform it.

Our conclusion therefore is, that as the attachment of Johnson gave him a *lien* on the land, subject to the prior claim of the bank, he is entitled to the surplus of the purchase money, after discharging the bank debt, in preference to any *lien* which McIlvaine had, in virtue of the contract between Gee and the garnishee, which, however valid and binding it might have been as between themselves, can have no efficacy against a right acquired by a creditor, previous to the time when the contract became obligatory on the garnishee. This brings us to the consideration of the question, whether the land could be levied on by attachment, having been previously levied on by the bank execution, by a different officer.

By the act of 1837, an attachment may be levied on land. [Clay's Dig, 60, § 29.] The attachment law does not specify the mode in which this shall be done, and it is sufficiently manifested by the return of the sheriff, stating the fact, and describing the land levied on. We are not able to perceive how the fact, that the land had been previously levied on by execution, by a different officer, could prevent a creditor from levying his attachment subsequently, previous to its sale. The former levy did not divest the title of the defendant in execution. It still remained in him. He could, notwithstanding, have made a valid sale, and transfer of the land, subject to the *lien* of the judgment creditors, and if so, what reason can there be why a creditor may not levy process on that, which the debtor could sell. That the execution debtor may transfer his title to personal property under such circumstances, was held by this court in Atwood v. Pierson, 9 Ala. Rep. 658, and again in Jackson v. Gewin, Ib. 116, and if so, there can be no doubt he can make the same disposition of real estate, under the same circumstances.

Nothing is more common, than that successive attachments, or executions, should be placed in the same officer's hands, against the same person, in which case, if the property was not sufficient to satisfy all, they would be satisfied according to their respective priorities. That rule, it is contended, does not apply here, because the levy of the bank execution was made by the bank marshal, whilst the attachment was levied by the sheriff of Wilcox. To sustain this

proposition, he relies upon the case of *Hagan v. Lucas*, 10 Pet. 400. The point there determined, is, that slaves taken in execution by the sheriff of a State court, cannot be again levied on by the marshal of the United States court, though a bond had been given to try the right of property in the State court, and the slaves delivered to the claimant. The principal argument, on which the decision is based, is, the conflict of jurisdiction, which would ensue if the property, whilst in the custody of the law under process from one jurisdiction, could be seized by process emanating from another. However true this proposition may be, in regard to personal property, which may be actually seized, and which cannot therefore be in the possession of two different persons, it does not apply to land, of which no actual seizure can be made, and of which the levy of an attachment can only create a *lien*, with a right to sell for the satisfaction of the judgment, if obtained. The levy of the bank execution on the land, was merely the initiatory step to a sale of the land, for the satisfaction of the judgment. If no such levy had been made, the levy of the attachment would have been subordinate to the prior judgment *lien*. The levy of the bank execution on the land, was merely for the enforcement of the *lien* of the judgment, and if the property had been divisible, no more should have been sold, than was necessary to satisfy the judgment. If that were impossible, or if, from any other cause, the entire tract was sold, the attaching creditor having a general *lien* on the land, must be entitled to the surplus, after discharging the judgment of the bank. If this is not so, the surplus would belong to the defendant in the judgment, as there can be no doubt, the sale by the marshal, would convey to the purchaser the title to the land, which in virtue of the paramount *lien* of the bank judgment, would be good against the subsequent *lien* of the attachment.

It is urged that the summons to Johnson, to contest his right to the funds in the hands of the garnishee, is not authorized by the statute. The act provides, that when the garnishee shall answer, "that previous to the time of such answer, he has received notice of the assignment, or transfer of the debt, or property, in respect to which the garnishment issued," the court shall not determine on the validity of the

assignment, or transfer, but shall cause a notice to be issued to the party to whom the transfer is alledged to have been made, to contest with the plaintiff, the validity of the transfer, or assignment. [Clay's Dig. 63, § 39, 40.] In our judgment, the levy of an attachment, is within the evident intent and meaning, if not within the letter, of the statute. It is a transfer by operation of law, which is as fully within the intent of the statute, as a transfer in fact by the debtor. If this is not the proper construction of the law, a large class of cases, fully within the mischief designed to be prevented, are not provided for, and there would be no adequate protection for the garnishee, but in filing a bill of interpleader.

There can be no doubt, that in any case embraced by this statute, a writ of error will lie at the suit of any party aggrieved by the judgment of the court.

Johnson is the only party who has assigned error in this court, but as the cause must be remanded, it may be proper to remark, that the court committed an error, in referring to the jury the question whether the plaintiff, or McIlvaine had the superior *lien*. It was the province of the jury to determine facts, and these ascertained, it was a pure question of law, which had the superior *lien*. Upon the facts stated in the answer of the garnishee, and of those admitted by the pleadings, it is our opinion, Johnson in virtue of the attachment, has a *lien* upon the funds remaining in the hands of the marshal, he having been notified of the attachment, superior to the *lien* either of the plaintiff, or McIlvaine. How the surplus, if any, should be disposed of, is a question not raised by any assignment of error. Judgment reversed and cause remanded.

MoCALEB, USE, &c. v. PRICE.

1. A promise to pay a sum of money for the delivery of a valuable paper, to which the person in possession has no claim, but which belongs to another, cannot be enforced. Nor will it vary the case, that the note which was given for the production of the paper, was made payable to a third person.

Writ of Error to the Circuit Court of Fayette.

THIS was a suit commenced by the plaintiff in error, before a justice of the peace, and removed by appeal to the circuit court. The cause of action is a promissory note, by which the defendant, on the 27th October, 1840, promised to pay to the plaintiff the sum of thirty-five dollars, on the 25th December thereafter. From a bill of exceptions sealed at the plaintiff's instance, on the trial in the circuit court, it appears that a man named Spencer was in possession of a deed executed many years previously, by which the grand-father of the defendant's wife gave her an estate in remainder in a slave, and the defendant proposed to pay him thirty-five dollars, to be secured by a promissory note, if he would deliver him the deed. Spencer being about to write the note, asked the defendant, if he would make it payable to the plaintiff; to which the defendant assented, and made the note sued on by subscribing his mark, as he could not write. When the deed was executed, it was delivered to Mrs. Price's father—her mother having an estate for her own life in the slave. How the deed was obtained by Spencer, was unknown to the parties interested in, or to whom it was delivered. The donor's signature was torn off the deed, when the defendant received it from Spencer, but how or by whom, did not appear. It was also shown that the defendant could not read, and that Spencer was an illegitimate son of the donor. Upon this evidence, the charge of the court was adverse to the

plaintiff's right to recover, a verdict was returned for the defendant, and judgment was rendered accordingly.

B. W. HUNTINGTON, for the plaintiff in error, cited 12 Ohio, 354; 1 Bailey's Rep. 355, 597; 32 Eng. Com. L. Rep. 39, 294; 2 Stewt. Rep. 479.

P. MARTIN, for the defendant in error.

COLLIER, C. J.—If a paper or other thing of value is lost, or even stolen, it is certainly competent for the party entitled to it, to undertake to pay a reward to any one who may find and return it. But such is not the case before us. Here, a party is in the possession of a valuable paper, to which he has no claim, but to which another is entitled—and the fairness of the manner in which he acquired possession, is even questionable. Under such circumstances, it cannot be endured that he shall stipulate for the payment of a sum of money as an inducement for its restoration to the proper custody. An enlightened morality, and the dictates of honesty denounce such a contract, and the law cannot lend its sanction to enforce it. *Besides*, if it were not thus obnoxious, it may be asked upon what consideration does the promise to pay, rest. The delivery of the deed to the defendant, or the donee of the interest for life, was nothing more than what duty enjoined, even if the possession had been fairly acquired. Spencer had no claim upon it, either legal or moral, for money, time, or labor expended in obtaining it, for the defendant; and he cannot be allowed to make a profit to himself.

There is no proof that the payee gave Spencer any consideration for the note, or was aware that it was payable to him, until after it was made; there does not appear to have been any conversation between himself and the defendant previous to the maturity of the note. In view of the circumstances of the case, it cannot be intended that the plaintiff occupies a position which places him above or beyond the defence relied on. If the plaintiff had, by an arrangement between the parties, substituted the defendant for his debtor, instead of Spencer, then perhaps the defendant would be precluded from setting up the fraud of Spencer, or the want of

a consideration ; but the proof is at fault upon this point. A promise by the defendant, after the maturity of the note would not avail any thing, as it would be gratuitous. [1 Ala. Rep. 622.] The proof, however, does not show such a promise, but nothing more than a declaration by the defendant after the note became due, that he would *take his own time to pay it*.

The facts then, establish the want of a consideration between the defendant and Spencer, and there is nothing in the record to relieve the plaintiff from the influence to which in law they are entitled. The charges of the circuit court are perhaps obnoxious to criticism, but they are substantially correct ; consequently, the judgment is affirmed.

THE BRANCH BANK AT DECATUR v. HAWKINS,
ADMINISTRATOR.

1. A promise by an administrator, after the expiration of eighteen months after the grant of letters of administration, to pay a debt which had not been presented to him, will not take it out of the statute of *non-claim*.

Error to the Circuit Court of Lauderdale.

ASSUMPSIT by the plaintiff in error, on a promissory note of the defendant's intestate. Plea of the statute of non-claim.

Upon the trial, as appears from a bill of exceptions, the plaintiff having failed to make presentation of the claim as the law requires, introduced evidence of a promise by the defendant, after the expiration of the period, within which it should have been presented, and thereupon the court charged the jury, that if they believed from the evidence, that the defendant had promised to pay the debt to the plaintiff, after the expiration of eighteen months from the grant of letters of

administration, and before this suit was brought, although there had never been a presentation of the note to the defendant as administrator, the plaintiff was entitled to recover. To this charge the defendant excepted, and now assigns it as error.

L. P. WALKER, for plaintiff in error.

1. The statute of non-claim knows no exceptions except those provided by itself—that is, that it shall not extend to persons under age, *femes covert*, insane or *non compos mentis*, to debts contracted out of the State, or to claims of heirs or legatees; and saving these, it is a positive and complete bar. [Borland v. Darrington, 3 Porter, 9; Thrash v. Sumwalt, 5 Ala. R. 14; McBroom v. Governor, 6 Porter, 32; Doe, ex dem. Duval's Heirs, v. McLoskey, 1 Ala. R. 740-1-2-3, &c; Brown, et al. v. Anderson, 13 Mass. R. 201; Scott v. Hancock, et al. 13 Mass. R. 162; Emerson v. Thompson, 16 Mass. R. 429; Thompson v. Brown, et al. Id. 172; Dawes v. Shed, et al. 15 Mass. R. 7; Thompson v. Peter, 12 Wheaton, 565.]

2. The object of the statute of non-claim was to enable those interested in the estate as distributees or legatees, to call on the personal representative at the end of eighteen months, to distribute it; and as it enables the personal representative, at the expiration of that period, to distribute the estate with perfect security; so it likewise “confers the right on the distributee to insist that his portion shall not be lessened by any *admission* of the personal representative.” [5 Ala. R. 20; 3 Porter, 9; Boggs v. Br. B'k Mobile, 10 Ala. R. 974.]

3. “It was designed to present a perfect bar for the benefit of creditors or distributees.” [10 Ala. R. 974.] “A claim not presented within eighteen months after it accrues, or after the grant of letters of administration, is forever barred.” [Jones's Ex'rs v. Lightfoot, 10 Ala. R. 27.] “It is emphatically a statute of repose, and as any revival of the liability of the personal representative would necessarily impede the settlement of estates, such a revival is not permitted to arise out of his admission.” [5 Ala. R. 20.] “The claim must be presented, or it is barred.” [5 Ala. R. 591.]

4. The statute is one which the administrator is bound to plead, or be personally liable. [6 Porter, 32; Gookin v. Sanborn, 3 N. H. Rep. 491. Vide further Burdett v. Drew, Ex'r, 8 Pick. 103; Evans v. Norris, 1 Ala. 511; Jones v. Pharr, 3 Ala. 283; Bank of Ala. v. Gibson's Adm'r, 6 Ala. 814; Tartt v. Travis, 8 Ala. 574.]

5. The analogy of the statute of limitations, even granting that an administrator's promise will take a case out of that statute, avails nothing. The law in that case provides that the promise takes the case out of the operation of the statute, but here it provides that presentation shall. And if a promise can defeat the statute of non-claim, by parity of reason, a presentation should defeat the statute of limitations.

6. But the promise of an administrator will not take a case out of the statute of limitations. [Doe, ex dem. Duval's Heirs, v. McLoskey, 1 Ala. 741; 1 Smith's L. C., Hare & Wallace's Notes, 436-7-8; Thompson v. Peter, 12 Wheaton, 565.] In the notes to Smith's L. C. *supra*, the *rationale* of the doctrine is very ably investigated, and the reasoning is conclusive to show that the promise of an administrator will not take a case out of the statute. See also the cases from Pennsylvania and Connecticut, there referred to. See also 8 Ala. 353, the reasoning of which is entirely consistent with 9 Ala. 502.

7. But there was no liability upon which to rest the promise. The presentation of the claim to the administrator being a pre-requisite, essential to revive the debt, which, after the death of the testator, was in abeyance until the creditor had done that which by the law he was bound to do.

NOOE and KENNEDY, for defendants in error.

The only point in this case is, whether an administrator, by a promise to pay a debt barred by the statute of non-claim, can revive the debt so as to bind the estate which he represents.

That an express promise to pay a debt within the time prescribed by the statute, will remove the bar of the statutes of limitation. [See 2 Will. on Ex. 1384; Tullock v. Dunn, Ryan & M. 417; Hall, Wicks & Co. v. Darrington, 9 Ala. 502; Atkins v. Ludgold, 2 Barn. & Cress. 12; Newhouse &

Co. v. Redwood, adm'r, 7 Ala. 598; Lucas v. Thorington, 5 Ala. 504; St. Johns v. Garrow, 4 Porter, 223; Crawford, et al. v. Childress, ex'r, 1 Ala. (N. S.) 488.]

A promise by one of two administrators or executors, to pay a debt barred by the statute of limitations, binds the other. [6 Johns. 277; Head v. Manning, 5 J. J. Marsh. 225; 2 U. S. Dig. 385, § 582.]

Under plea of statute of limitations, defendant admitted the debt to be just, but said he did not think that his intestate intended he should pay it. Such evidence should be submitted to a jury as evidence of a new promise. [Bushnell v. Roby, 3 N. Hamp. 467; U. S. D. sup. 385.]

An admission of indebtedness by one of several administrators, will not entitle plaintiff to recover; but such evidence is proper as a link in the chain of evidence, and which, if not made by all, will be properly excluded by the court from the jury. [Forsyth v. Ganson, 5 Wend. 558; 2 U. S. Dig. 381, § 484, p. 382, § 505; see also McIntire v. Morris, 14 Wend. 90, as to powers of administrator to bind estate by admissions.]

It has been frequently decided, that an acknowledgment of a debt, barred by the statute of limitations, takes the case out of that statute, and revives the original cause of action. [3 Con'd U. S. Rep. 122; Clementson v. Williams, 8 Cranch, 72; Morrison v. Bell, 1 Peters, 351.]

The doctrine that a promise by one of two or more administrators will take a case out of the statute of limitations, as laid down above, is expressly overruled in Forsyth v. Ganson, 5 Wend. 558, and also in Caruthers & Kinkle v. Mardis, adm'r, 3 Ala. R. 599.] This only goes to sustain the doctrine, that the promise must be made by all, to bind the estate; and it follows necessarily, that a promise by a sole administrator will bar the act.

An acknowledgment within six years, by the executor or administrator of the debtor, that the debt is undischarged, will take it out of the statute of limitations, whether the creditor be living or not at the time of the acknowledgment. [Minot's Mass. Dig. 459, § 5; Baxter v. Penniman, 8 Mass. R. 133; Emerson v. Thompson, 16 Id. 428.]

An acknowledgment made to a stranger, in the absence of

the plaintiff, will take a demand out of the statute. [Minot sup. § 14; Whitney v. Bigelow, 4 Pick. 110.]

A promise within six years, by the guardian of a spendthrift, to pay a debt due to the ward, will take the case out of the statute of limitations. [Manson v. Felton, 13 Pick. 206; Minot's Dig. 460, § 18.]

In the case of Duval's Heirs v. McCloskey, 1 Ala. 740-3-4, it is held, that the special, like general statute of limitations simply bars the remedy, but does not extinguish the debt.

By a *dictum*, they say, that in neither case will a promise by an administrator, to pay the debt, revive the remedy. They also state that the statute of non-claim was made, more for the benefit of the administrator than the distributees. [Peck v. Bottsford, 7 Cowen's Rep. 180; Thompson v. Peter, 12 Wheat. 565; 4 C. U. S. R. 649.]

This cause does not sustain the version given it by our supreme court, nor does it conflict with the general doctrine of the binding efficacy of an express promise in 2 Will. on Ex. 1384.

As to presentation—The legislature clearly intended that the administrator should be furnished with such vouchers, or reasonable evidence as might induce a belief that the claim was just. [Bigger's Adm'r v. Hutchings, 2 Stewart, 448.] The mere exhibition of the account which the creditor claims, is quite sufficient. [Mardis' Adm'rs v. Shackelford, 4 Ala. 503.]

ORMOND, J.—The decision of the court below, is attempted to be sustained in this court, on the supposed analogy between the statute of *non claim*, and the general statute of limitations. It is true, that the former is, in effect, a statute of limitations, as the omission to make presentation of claims, as required by law, in the language of the act, forever bars their recovery; but it by no means follows, that the analogy is complete. To prevent the bar of the statute of non-claim, the law requires an act to be done by the creditor, for which the promise of the administrator to pay the debt, cannot be an equivalent. Notwithstanding the general statute of limitations may have run against a debt, the debt still continues, and consequently the moral obligation to pay it

still exists, which will be a sufficient consideration for a promise to pay it. Not so with the statute of non-claim. The omission to do the act prescribed by the statute, extinguishes the liability of the estate for its payment. It is forever barred, and by necessary consequence, the promise of the administrator cannot revive it against the estate, for the benefit of which, and not of the administrator, the act was passed.

The received doctrine of this court, that an administrator, may bind the assets of the estate he represents, by a promise to pay a debt barred by the general statute of limitations, does not conflict with the view here taken. The administrator represents the intestate, and there is therefore nothing incongruous in permitting him to do what the intestate might have done had he lived, and which indeed, it might be the interest of the estate should be done, to prevent unnecessary litigation. But the statute of non-claim has no reference whatever to the moral obligation of payment. It does not refer itself to the administrator, as the organ appointed by law, to fulfil the duties left unperformed by the deceased; but has reference to the estate, and its speedy settlement. It prescribes a rule by which he is to be governed for the accomplishment of this object, and declares that all debts not presented to him, within the prescribed period, shall be extinguished.

Judgment reversed, and cause remanded.

MCCORD v. BOYD, ET AL., USE, &C.

1. The clerk's fees for making out the transcript upon a writ of error to the supreme court, are not taxed as part of the costs of the supreme court, but should be taxed as costs accruing upon the judgment in the primary court.

Error to the County Court of Lowndes.

THIS was an action of debt at the suit of the defendants on a bond executed by the plaintiff, and Abram Borland, on the 16th April, 1844, in the penal sum of four thousand dollars, for the prosecution of a writ of error, by which the record and proceedings of a cause in chancery were returned to this court for revision. The declaration is on the penalty of the bond, without noticing the condition.

The defendant cravedoyer of the bond and condition, set them out *in extenso*, and pleaded that his principal, Borland, had well and truly observed, performed, fulfilled and kept all and singular, the articles, clauses, payments and agreements specified in the condition, according to their tenor and effect, true intent and meaning, &c. To this the plaintiff replied, that Borland did sue out and prosecute the writ of error, and the supreme court did adjudge that the decree in the chancery cause be affirmed against him, and that the plaintiff in this suit recover of the defendant and his principal, Borland, the costs of the supreme court upon the writ of error, amounting to the sum of \$200; of all which the defendant had notice. Yet the defendant, or Borland, although often requested to pay these costs, have hitherto refused to pay the same, by reason whereof the obligation of their bond is forfeited, &c. The defendant rejoined, alledging the payment of all the costs of the supreme court, and the judgment which was rendered by that court. On the issue thus made, the cause was submitted to a jury, who returned a verdict in favor of the plaintiff, for \$72, and judgment was thereon rendered.

From a bill of exceptions sealed at the defendant's instance, it appears that the beneficial plaintiff is the register of the court of chancery sitting in Lowndes, that he had taken the bond in suit, issued the writ of error and citation to the defendant in error; that he made out and delivered with these, a transcript of the record to Borland. All which were duly filed in the supreme court, and the decree of the court of chancery affirmed. It was also proved, that the legal charges of the register for making out the transcript, was \$72,

which had not been taxed or paid. The defendant objected to all this evidence, but his objection was overruled, and the same was allowed to go to the jury.

It was further shown, that Borland, (who was now dead,) paid all the costs taxed by the supreme court, which included all that are usually charged in cases of this kind. But the register had not been paid for making out the transcript for Borland; nor were his fees for this service included in the bills of costs in the supreme or chancery courts—every other demand for costs had been fully satisfied.

The court charged the jury, that the plaintiffs were entitled to recover of the defendant whatever it was worth to make out the transcript for the supreme court. The questions arising upon the admission of the evidence, and the charge to the jury, are duly reserved, and now presented for revision.

J. M. BOLING, for the plaintiff in error, cited 4 Pick. Rep. 465; 11 Id. 143; 2 Tidd's Prac. 1215; 1 Barb. Ch. Prac. 347, *et seq.*

N. COOK, for the defendants in error, cited 1 Stew. Rep. 10; 2 Id. 509; 2 Port. Rep. 493; Clay's Dig. 285, § 4; 308, §§ 11, 13; 306, § 1; 307, § 6; 309, §§ 19, 21; 310, §§ 22, 26.

COLLIER, C. J.—It is provided by the act of 1820, that no judgment shall be suspended, unless the party applying for the writ of error, shall execute a bond with sufficient security to the adverse party, to be approved by the clerk, conditioned for prosecuting the writ of error to effect, and to pay and satisfy the judgment which shall be rendered in the cause by the supreme court. [Clay's Dig. 307, § 6.] The condition of the bond in the case before us, is in strict conformity to this enactment, and stipulates that the plaintiff in error shall prosecute his writ of error to effect, or if unsuccessful, that he will satisfy the judgment of the appellate court. An affirmance of the decree of the court of chancery, obliged the party against whom it was rendered, to pay the costs of that court, as well as those properly taxable here.

The same statute also enacts, that it shall be the duty of the clerk of the inferior court, in which the judgment or decree complained of is rendered, to issue a writ of error, with a citation, &c.; these, together with the transcript of the record in the cause, shall be delivered to the party applying for the writ of error, or his attorney, to be returned to the first day of the next term of the supreme court. [Clay's Dig. § 13.]

By the act of 1822, it is enacted, that when the supreme court shall affirm or reverse the judgment of an inferior court, it may give judgment and award execution against the unsuccessful party for the costs incurred in the supreme court, &c. [Clay's Dig. 309, 310, § 21, 22.] Previous to the passage of this statute, the court from which an appeal or writ of error was sued out, upon an affirmance or reversal of its judgment, issued an execution as well for the costs of the supreme court, as for every other matter recovered by either party. It was then the practice of the clerks of the primary courts, to tax in the bill of costs, the charges for issuing a writ of error, and citation, and making out the transcript, or any other service necessary to bring the cause before the supreme court; and to issue an execution for its collection against the party liable. This continues to be the practice in many, and we think most of the subordinate courts, and this court never has taxed these items as costs here incurred. If they were collected under an execution issued by the clerk of the supreme court, he would hold the amount for the benefit of the clerk from which the cause was sent up. The practice then, to which we have referred is altogether most convenient, and makes the clerk entitled to the money, the receiver of his own fees from the collecting officer. This practical construction of the statutes in question, furnishes a very potent reason for maintaining that it indicates the true rule on the subject. It may be added, that the services of the clerk of this court commence with docketing the cause, while the clerk of the inferior court initiates the proceeding, by issuing the writ of error and citation, and if the plaintiff in error desires it, he furnishes him the transcript. Perhaps it may be objected, that this service is all rendered after the judgment in the primary court, and therefore cannot be taxed under its

authority. To this it may be answered, that the judgment of this court, when (as in this case) it makes a definitive disposition of the cause, is, that the successful party recover the costs of the court below. Under such a judgment, there can be no objection to taxing costs accruing after the cause was there disposed of; and we incline to think, that the practice upon this point should be followed, without reference to the form of the judgment here.

It follows from what has been said, that the judgment must be reversed.

MOORE v. THE STATE.

1. The dying declaration of one deceased, made under the belief of impending death, is competent proof to go to the jury, either to show who is the guilty agent, or disclose the circumstances under which the crime was committed.
2. These declarations may be given in evidence, as well to acquit, as to convict the prisoner.
3. The dying declaration of a husband, is competent evidence against the wife, to show her guilt.
4. When these declarations are inconsistent with each other, it is the duty of the jury to weigh them, and to determine which, or whether either is to be believed; and if the charge of the court takes this duty from them, or if the court undertakes to determine these questions for the jury, it is error.

Error to the Circuit Court of Tallapoosa.

THE plaintiff in error, was indicted and convicted, in the circuit court of Tallapoosa county, for the murder of her husband. In the course of the trial, a bill of exceptions was taken, and the cause brought to this court by writ of error.

The bill of exceptions discloses the following facts. The

wounds of which the deceased died, appeared to be given with the edge of an axe ; one of them was on the front of the head, on the left side, and in length about the width of an axe ; that it cut through the scull into the brain. His physician reached him within thirty-six or forty hours after the wound was inflicted ; he was breathing, but insensible. The wound was dressed, and the deceased appeared to revive. He was asked if he felt better, to which he replied no. These facts were deposed to by the physician, who also stated that he thought him in his right mind, but said that a man whose brain had been injured, as his had, might speak rationally one moment, and be entirely out of his mind the next.

The State then offered a witness, to prove, that on the evening of the same day he took some nourishment to the deceased, and requested him to eat, stating that if he would, he would get well. The deceased shook his head, and said no. The witness then said to him, "do you know that Mrs. Moore done it?" The deceased answered "oh yes, well enough—well enough." To this evidence, the prisoner objected, but the objection was overruled. The deceased lived some four or five days after the foregoing declaration was made ; and another witness testified, that some days after the above declaration was made, the deceased stated, that Mrs. Moore "did not do it."

The court charged the jury, that the dying declarations of the deceased, owing to the condition of his mind, at the time they were made, should not be regarded by them, as he spoke but little, and in detached sentences. At any rate, that what one witness stated, was neutralized by what was stated by the other, if they were of equal credibility, and that they should not operate against the accused. To which charge the prisoner excepted ; and the bill of exceptions, with the matters therein contained, are here assigned for error.

L. E. PARSONS, for the plaintiff in error, insisted, that the declarations of the deceased were not properly admitted.

1st. Because there was not sufficient evidence that the de-

ceased was impressed with the belief of death, at the time they were made.

2d. That the relation of husband and wife, existing between the deceased and accused, his dying declaration could not become evidence against her.

3d. That the court erred in the charge given to the jury.

NOOE, contra.

DARGAN, J.—It is well settled, that in the trial of cases for homicide, the declarations of the deceased, made under the belief that his end is *near*, are admissible, not only to designate the party who committed the crime, but also to detail the circumstances under which it was done. But these declarations must be made when the belief of death is present to the mind of the declarant, and when he believes there is no hope of recovery, but that he must die of the wounds or injury received. Declarations made under such circumstances, are considered as made under circumstances equally solemn, as if made under the obligations of an oath, and are admissible. But it is the duty of the court to determine, in the first place, upon the admissibility of such declarations, and then it is for the jury to determine upon the weight, or credibility of them. [1 Greenl. Ev. 190.]

The facts disclosed by the record, in this cause, must satisfy any mind that the declarations were made at a time when the deceased was without hope of life, on earth, and under the belief of impending death. There was no error, therefore, in permitting the declarations to go to the jury.

But it is objected, that the relation of husband and wife, existing at the time, between the accused and the deceased, rendered the declarations incompetent proof. This is not the law. One of the first cases in which the question arose, upon the admissibility of dying declarations, was that of Woodcock, and the deceased was his wife. Her declarations were received as evidence. [2 Stark. Ev. 458.] And it is well settled, that a wife may be a witness in a criminal proceeding, against her husband, for injuries done to her person; and there is no reason whatever, why a husband should not be a competent witness against his wife, for injuries done

him. But in the charge of the court, as given, there is error. It must be borne in mind, that the evidence showed, that the deceased might be rational at one moment—insane, or irrational at another. On one day he said, in answer to the question, “do you know that Mrs. Moore did it?” “oh yes, well enough, well enough.” At a subsequent day it was testified, that he said, she “did not do it.” It may be fairly inferred, that at one time he accused her as the guilty agent, and at a subsequent time, acquitted her of guilt.

We conceive the rule to be, that the dying declarations of the deceased may be given in evidence, as well to acquit, as to convict the accused, and they are not limited, as evidence in favor of the State alone. [See 1 Greenl. Ev. 190 ; Rex v. Scaife, 1 Mood. & R. 551.]

Here the declarations of the deceased were inconsistent with each other. There was then a direct conflict of testimony. It was the province of the jury to weigh the testimony, to reconcile it if they could, and if it could not be, then to determine which to believe. The declarations of the deceased, if made, as stated in the bill of exceptions, were in direct conflict with each other, and it was the duty of the jury to determine which declaration was true, or to which they gave credit as true. The charge of the court took from them this duty, and determined that the contradictory declarations of the deceased, neutralized each other. Whether they did or not, or whether either, or which one was true, was by law, the duty of the jury to determine—not that of the court ; and for this error, the cause is reversed, and remanded, that the prisoner may be again tried, unless, in the mean time, she be discharged by due course of law.

WALLACE AND LEWIS v. PECK & CLARK.

1. The principal is not a competent witness for the agent, in a suit brought by him against an attorney, for the recovery of a debt due the principal, which the agent had placed in the attorney's hands for collection; as the record would be evidence for the principal, of the amount recovered, in a suit by him against the agent.
2. When money is collected by an agent, for persons who are themselves agents, he may discharge himself, either by paying it over to those from whom he received the claim, or to the true owner; but cannot discharge himself, by paying it to the payee of the note, he not being in fact the true owner, and the note not having been received by him from the payee.

Error to the County Court of Tuscaloosa.

THIS was an action of assumpsit by the plaintiffs in error, against the defendants in error, and was here at a previous term of this court. [10 Ala. 142.] The facts as they now appear, are, that the defendants in error, as attorneys at law, received from the plaintiffs a note for collection on Lamkin, Gilkey & Co. for \$146 26, payable to the order of Jeremiah Boyd, and indorsed in blank by him. The money was collected by Peck & Clark, and transmitted to Boyd, they supposing him to be the person entitled to receive it.

The plaintiffs offered the deposition of one Trevor, to prove, that the note was his property, and that he placed it in the hands of the plaintiffs for collection. The witness stated, that he did not consider he had any interest in the suit, as he held the plaintiffs accountable for it. On motion of the defendants, the court excluded this testimony, and the plaintiffs excepted.

The defendants then proved, that it was common, when notes were sent here for collection, for the owner to indorse them in blank, before sending them, and that when so indorsed, they paid the money to the last indorser, if sent by him. There was no evidence whatever, that the defendants had any knowledge, that the note did not in fact belong to the payee, until after they had paid him the money.

The plaintiffs then moved the court to charge the jury, that upon the evidence, they must find for the plaintiffs. This charge the court refused to give, and charged the jury, that if they believed the evidence, they must find for the defendants.

To this the plaintiffs excepted, and now assign these matters for error.

PETERS, for plaintiffs in error.

The plaintiffs made out their case when they read the receipt of Peck & Clark, and proved the collection of the money. The evidence is the same as in the former case. The evidence is sufficient to authorize a recovery without Trevor's deposition. Trevor has no interest, as he swears; his claim is good against Wallace and Lewis; he asserts it, and never has abandoned it. This record would not be evidence in a suit between Trevor and Wallace & Lewis; if it was read, it would prove nothing; the evidence in the latter case, if one was brought, is *in pais*—this record does not furnish it.

The court erred in charging, that the verdict must be for defendants; in refusing to let the jury determine whether evidence enough to make out plaintiffs' case existed without Trevor's deposition, which had been excluded.

Trevor's claim against Wallace & Lewis does not depend on the result of this suit; if decided against Wallace & Lewis, that does not affect Trevor's claim on them.

The case should be reversed, because the court decided the effect of the evidence, and not leaving it to the jury. The former decision covers this case. [10 Ala. 142.]

PECK, contra.

1. The deposition of Trevor being excluded, the evidence showed the note upon which the defendants had collected the money belonged to Boyd the payee, and consequently his receipt of the money is a good defence, on the authority of this case when here before.

2. The deposition was properly rejected. Waiving, for the present, the objection to the competency, a large part of the deposition is irrelevant, and, being offered as an entire

piece of evidence, the court was not bound to separate the relevant from the irrelevant matter, and therefore no error was committed in excluding the whole. Evidence will be rejected as well for its irrelevancy as for its incompetency. [Walker v. Leighton, 11 Mass. Rep. 140, 142.] The deposition was argumentative, and therefore well calculated to make an improper impression upon the jury.

3. The deposition was properly rejected for the incompetency of the witness—1. Because, a verdict for the plaintiffs would be evidence for the witness in a subsequent suit by him against the plaintiffs. [1 Phil. Ev. by Cow. & Hill, 55, 56.; 1 Greenleaf Ev. p. 564, § 527, 390, 394-5-6.] 2. The deposition itself would be evidence in such suit for the witness against the plaintiffs; being offered by them in this case on their behalf, they thereby admit its truth; it would therefore be evidence against them, on the principle of an admission. [1 Greenl. Ev. 226-7, § 194.]

ORMOND, J.—We will first consider the competency of Trevor as a witness for the plaintiffs. The opinion of the witness, that he had no interest in the question, because he held the plaintiffs responsible to him, will not render him competent, if in fact he was interested. It is insisted that he had an interest, because the verdict, and judgment, would be evidence for him, in an action by the witness against the plaintiffs, and that is our opinion. It is admitted, and also established by the evidence of Trevor, that the plaintiffs are suing for this money as the agents of Trevor, it having been sent by him, to them for collection. If they recover in this action, it will be money in their hands belonging to him, and the recovery in this case, will be conclusive on them, upon the additional proof being made that the recovery was had by them as his agent, which would in fact be only proving the subject matter of the suit. That the record may be thus explained, by parol proof, is established by the decisions of this court, and of other courts of the highest authority. [Parker v. Thompson, 3 Pickering, 429; Kilheffer v. Herr, 17 S. & R. 319; Cist v. Zeigler, 16 Id. 282; Seddon v. Tutton, 6 D. & E. 607; 9 Porter, 397; 6 Ala. 27.]

In Green v. The New River Co. 4 D. & E. 589, an action

was brought for an injury caused by the negligence of one of the defendant's servants, and evidence being offered of the fact of the negligence, the defendant proposed to call the servant to whom the neglect was attributed, to prove that there was no negligence, and it was held that he was an incompetent witness, because the verdict rendered against his employer, would be conclusive in an action against him by the master, as to the *quantum* of damage, though not as to the fact of the injury. That appears to be the precise predicament of this case. In an action by Trevor, against the plaintiffs, upon proving that they were his agents in the collection of this money, the verdict and judgment would be conclusive of the amount in their hands belonging to him.

But the court, in its charge to the jury upon the evidence, erred. When the case was here previously, we held, that although the plaintiffs were the agents merely of Trevor, yet the defendants, by executing their receipts to them, and promising to collect the money for them, had become their agents, and that they could maintain this action in their own names, unless the true owner had asserted his right to the money, and intercepted it in the hands of the defendants. To exonerate themselves, then, from liability, they must show, that they have paid the money to the true owner. The money was paid to Boyd, who was the payee of the note, and who has indorsed it in blank, but the evidence afforded by the letters which were introduced, establishes conclusively, that Boyd had no right to the money, but that it belonged to Trevor, to whom Boyd had indorsed it.

There was evidence, that it was the custom, when foreign notes were sent here for collection, for the owner to indorse them in blank, and that when so received, it was customary when the money was collected, to transmit it to the last indorser. However competent such evidence might be, to establish a *prima facie* case of ownership, it can avail nothing here: First, because it is shown that Boyd was not the owner, and had no right to the money. Secondly, because the defendants did not receive the note from Boyd, and therefore had no right to presume that he was the owner, merely because his name was on the paper as an indorser. The plaintiffs were their principals, and they can only excuse

themselves from accounting to them, by showing they have paid the money to the true owner.

The court therefore erred, both in the charge given, and the one refused. Judgment reversed, and cause remanded.

BANK OF THE STATE OF ALABAMA v. COMEGYS,

ET ALS.

1. In a suit by the bank, against the cashier on his bond, to recover damages, because he had failed to protest a bill of exchange, left with the bank for collection, it was proved that it was the duty of the cashier to attend to this department. It was also proved, that a resolution was introduced by a director, and passed, requiring the cashier so to arrange the duties of the various officers of the bank, as to give to Mr. Ball, (an officer of the bank,) the necessary assistance in his department. Under this resolution, a written memorandum of the various duties of each officer was drawn up and signed by all the officers, except two, by which Mr. Saunders, the second book-keeper, was charged with the duty of attending to the collecting register, and proceeded to discharge, and did discharge, that duty, until after the default complained of. This memorandum, agreed on by the officers of the bank, was by Comegys, laid on the table of the board of directors, when in session, but it was not proved that it was read, or acted on by the board: Held, that it was a reasonable inference, that the board of directors assented to, and approved of this arrangement of the officers of the bank—that as they did not dissent from it, they must be considered as acquiescing in the arrangement so made.

Writ of Error to the Circuit Court of Tuscaloosa.

THE plaintiffs in error brought an action of debt against the defendants, in the circuit court of Tuscaloosa county, and declared on a bond by them executed, and conditioned, that if Edward F. Comegys, one of the defendants, should perform all the duties required of him as cashier of said bank, then said bond to be void, otherwise to remain in full force: and then by way of breach of condition, set forth that certain

bills of exchange were deposited with said bank for collection ; that they were not protested at maturity, whereby the bank was charged with the payment of them, and that it was the duty of said Comegys to attend to the collection of them, and to have them protested for non-payment, if not paid at maturity. Issues being joined, the cause was submitted to a jury, and on the trial a bill of exceptions was taken, which presents the following facts. The plaintiffs in error introduced a resolution of the board of directors, passed in the year 1828, whereby it was made the duty of the cashier of said bank to attend to the collection of bills and notes placed in said bank for collection ; and also proved, that the predecessors of Comegys, in the office of cashier, attended to the collection of bills and notes, left with the bank, and handed them out to a notary for protest, if not paid. The defendants in error proved, that Comegys was elected cashier in the year 1836, and continued in office until 1840, and then read a resolution in the following words, passed 16th August, 1837 :

Resolved, that the cashier be required to regulate the duties of the officers of the bank, so as to render Mr. Ball, the necessary assistance in his department.

The defendants then introduced a memorandum in writing, made shortly after the adoption of the resolution of the 16th August, 1837, which was signed by the cashier, and all the other officers of the bank, except the teller and one clerk ; which paper, or memorandum, contained a specification of the duties of the respective officers of the bank ; and by the terms thereof, it was made the duty of the second book-keeper, to receive all bills and notes handed said bank for collection, and to file them away, after calculating the time when they may fall due ; to the admission of which memorandum, the plaintiff objected, but the objection was overruled.

The defendant then offered a witness, who was a director of said bank, who stated, that he had offered the resolution of the 16th August, 1837, and soon after, he went into the bank, and inquired if the matter of difficulty had been arranged, he was answered, that it was reduced to writing—shortly afterwards, Comegys came into the directors' room, and

the witness thinks the board was in session, and laid a paper on the table, and said, there was the arrangement made with the clerks of the bank, but thinks the paper was not read or acted on. Another director proved the same facts, with the addition, that he picked up the paper to examine if his son-in-law, who was a clerk in said bank, had signed it. Another director stated he saw the paper on the table, but it was not acted on. The defendant also proved, that subsequent to this agreement, or regulation of the duties of the officers of the bank, one Saunders, 2d book-keeper, discharged the duties assigned him up to the time, and after the default complained of was made. That at the time of receiving said bills of exchange, Comegys handed them to Saunders to register them, to note the time when they fell due. That said Saunders noted them on the books, as falling due on the first and fourth of February, when they fell due the first and fourth of January. It was also shown, that Saunders was a notary public, and usually acted as the notary of the bank. That after the bills were registered, they were placed in pigeon holes, kept for the purpose, and that it was the habit of said Saunders, to examine these pigeon holes every day, and to protest such paper as was not paid. Said Saunders also stated, that he had no doubt, that he would have protested said bills, but for the mistake in registering them. The plaintiff then proved, that Mr. Hawn, the successor in office of the defendant, attended himself to the registering of paper for collection, and of handing it out for protest. That this was the course Comegys pursued, before the agreement, but Saunders stated, that he sometimes attended to this for Comegys before the agreement, as well as after, but that he always considered he was acting gratuitously, for the benefit of Comegys.

It was shown that Saunders was a competent officer, and well qualified to discharge the duty assigned to him by said agreement.

On this evidence, the defendant requested the court to charge the jury, that if said Comegys laid said paper on the table of the said directors, whilst they were in session, and informed them, that it contained the assignment of the duties

of the officers of the bank, under the resolution of August 16th, 1837, and the board of directors did not object to the same, nor give notice that they did not assent to the same, and the officers of the bank afterwards discharged the duties assigned them by said agreement, that it was a ratification by the bank of said assignment of duties—which charge the court gave. The plaintiff's counsel moved the court to instruct the jury, that under the resolution of August, 1837, Comegys had no authority to make the agreement, or to shift off from himself any legal responsibility; which charge was refused, and the court charged, that if Comegys presented said agreement to the board of directors, and they did not object to it, or give notice of their dissent to it, to Comegys, then the bank would be considered as acquiescing in the same, and would bind the plaintiff. The plaintiff also requested the court to charge the jury, that they must be satisfied, that the agreement was read to the board of directors, or its contents known to them, or they could not be held to have acquiesced in the same; which was refused, and the court charged, that if Comegys laid the same before them, and informed them that it contained the assignment of duties under said resolution, the board would be considered as acquiescing in the same, unless they informed Comegys of their dissent.

A verdict was returned for the defendants, and judgment being rendered thereon, the plaintiff assigns for error the charges of the court as given, and the refusal to charge as requested.

P. MARTIN and NOOE, for plaintiff in error, made the following points:

1. It was the duty of Comegys to attend to the collecting register.
2. That the bank never recognized the arrangement of duties, as prescribed in the written agreement, between Comegys and the officers of the bank.
3. That the resolution of the 14th August, 1837, did not authorize Comegys to relieve himself from any of his duties, or his responsibilities.

A. F. HOPKINS and E. W. PECK, for the defendant made the following points :

1. That the directors had the power to prescribe the duties to each officer of the bank.
2. That this power could be exercised by an agent.
3. That under the resolution of the 16th August, the arrangement of the duties, as set forth by the written agreement, between the officers, under the evidence, was binding on the bank.

DARGAN, J.—Whether the court erred in the charge given, or in refusing to charge as requested by the plaintiff in error, depends on the question, whether it was the duty of Edward F. Comegys, the cashier of the bank, at the time of the omission to have the bills protested, to attend to the collecting register, as it is called. That is, was it his duty to receive the bills and notes left with the bank for collection, to register them in the books of the bank, to note the time they became due, and if not paid at maturity, to hand them to a notary to be protested. This was the duty of the cashier, as is fully shown, from 1828 up to the year 1837—on the 16th of August, 1837, the board of directors passed a resolution, requiring Edward F. Comegys, the cashier, so to arrange the various duties of the officers of the bank, as to give to Mr. Ball, the necessary assistance in his department. Under this resolution, a written memorandum of the various duties of each officer was drawn up, and signed by all the officers except the teller, and one clerk ; and by this memorandum, or arrangement of the duties of the officers, Mr. Saunders, the second book-keeper, was charged with the duty of attending to the collecting register. This instrument, which particularly specifies the duties allotted to each officer, was laid on the table of the directors, whilst they were in session, by Comegys, and he then informed them that it contained the arrangement of the duties of the officers of the bank, under the resolution of the 16th of August. No dissent to this assignment of the duties of the officers was expressed by the board, nor by any director, and the officers went on to discharge their duties, in the manner set forth in this me-

memorandum, until after the default happened—which is complained of. Under these circumstances, is it to be inferred that the board assented to this arrangement of the duties of the officers of the bank?

It is certainly law, that the assent of a corporation may be presumed, to acts done for, and on their account. [9 Ala. R. 513, 516; 6 Ala. R. 657; 2 Ib. 451.] So when an individual does an act, as the agent of a corporation, the agency may be shown by a corporate act, or inferred from the same evidence, that would justify the inference in the case of a natural person. [2 Ala. Rep. 451; 13 Peters, 519; 4 B. & C. 575.]

These authorities establish, that the assent, or approval, of a corporation to acts done on its account, may be inferred, in the same manner, that the assent of a natural person may be. This being the law, we can arrive at no other reasonable conclusion, than that the board of directors assented to, and approved of, this arrangement of the duties of the officers of the bank. The board of directors certainly possessed the power to arrange, or prescribe the duties each officer should perform, and this power could be exercised by an agent.

The arrangement therefore, of the duties of the officers, as set forth in the memorandum, is the act of, and is binding on the bank; consequently it was not the duty of Comegys, at the time the default happened, to attend to the protesting of the bills, and notes, left in bank for collection; therefore, the memorandum of the duties of the officers of the bank was properly admitted as evidence, and the court did not err in the charge given, nor in refusing to give the charges requested by the plaintiff in error. The judgment is consequently affirmed.

WILSON v. SERGEANT.

1. Money paid by mistake, by the administrator of an estate, to another administrator, may be recovered back, if demanded before paid out in the distribution of the assets of the estate.
2. The law implies a promise to pay whenever one has money in his hands belonging *ex* another, which in *equo et bono*, he has not the right to retain.

Error to the Circuit Court of Franklin.

ASSUMPSIT by the defendant, against the plaintiff in error.

Upon the trial, as appears from a bill of exceptions, Sergeant, administrator of the estate of Edmund O'Reilly, paid to Wilson, adm'r *de bonis non* of the estate of P. O'Reilly, \$2,296 87, in part discharge of a decree, which had been obtained in the orphans' court of Franklin, in favor of the estate of the latter, against the estate of the former. Four days afterwards, Sergeant, ascertaining that he had not retained a sufficiency of the funds of the estate of E. O'Reilly, to pay his commissions, and the costs of court, applied to Wilson to pay him back the deficiency, viz: \$601 91. Wilson made objection, that he apprehended he would be held responsible by the legatees for the sum so received, but on the promise of Sergeant, that he should not suffer, agreed to pay it back, received the receipt which had been previously executed, and wrote another for the reduced amount; but it being late in the evening, did not pay over the money, but remarked he would do it in the morning. The next morning, he refused to pay it without a bond of indemnity, which Sergeant refused to give. Sergeant also proved by the record of the orphans' court, that the estate of E. O'Reilly was indebted to him about \$180, in addition to the sum demanded to be paid back.

The court charged the jury, that the plaintiff was liable to the defendant only to the amount of the assets which came to his hands, after paying all legal expences, and any excess which he paid the defendant beyond that, he was entitled to recover back, and that a promise to pay back such excess,

was a valid promise ; to which the defendant excepted. He then asked the court to charge, that if the estate of E. O'Reilly was indebted to the estate of P. O'Reilly, in the amount paid by the plaintiff, and the plaintiff paid the money out of the assets of E. O'Reilly's estate, as the administrator, to the defendant, as the administrator of P. O'Reilly, then the plaintiff cannot recover back the sum sued for as a part of the money so paid, notwithstanding the plaintiff may not have retained enough in his hands to pay his commissions, and the costs of administering ; and notwithstanding the defendant may have promised to pay it back, if he could be safe in so doing. This charge the court refused to give, and the defendant excepted. This is the matter now assigned as error.

NoOE, for the plaintiff in error.

W. COOPER, contra, cited Elliott v. Swartwout, 10 Peters, 137 ; Bond v. Hoyt, 13 Id. 263 ; Cary v. Curtis, 3 How. (U. S.) 236 ; Yarbrough v. Wise, 5 Ala. 292.

ORMOND, J.—The principle which governs this case, is the one involved in the case of Yarbrough v. Wise, 5 Ala. 292—that money paid by mistake, to an agent, or stakeholder, may be recovered back, if he is notified of the mistake, before he pays it over to his principal. There is no pretence here that the money was paid out in the distribution of the assets, or in the payment of the debts of the estate, before the demand made by Sergeant, and upon the well established principles of law, he could not refuse to refund it.

The charge moved for, assumes that if the money paid to the defendant, by the plaintiff, belonged to the estate of E. O'Reilly, it cannot be recovered back ; but it is clear the assets of the estate in the hands of the plaintiff, consisted of the amount which would be left, after paying the charges against it, and the settlement subsequently made by the plaintiff, with the orphans' court, ascertains conclusively, the assets in his hands, subject to the payment of the debts.

We may lay entirely out of view, the promise of the defendant, as the law implies a promise to pay, whenever one has money in his hands, belonging to another, which *ex equo, et bono*, he has not the right to retain, and which on demand he refuses to pay to the right owner. Judgment affirmed.

CAPSHAW, ET AL. V. FENNELL.

1. When a vendor, upon the sale of a tract of land for a sum in gross, innocently represents it as containing 300 acres, when in fact it contains but 282 acres, and the vendee sometime afterwards accepts a deed from one in whom the legal title is vested, reciting that the tract contains but 282 acres, after which the vendee executes his notes to the vendor for the purchase money unpaid, without objection; and there being evidence tending to establish, that the *locality* was a leading inducement to the contract—the vendee cannot have compensation for the deficiency, as the inference from the facts, is, that if the deficiency had been known at the time of the sale, the terms of the contract would not have been altered.

Appeal from the Court of Chancery at Huntsville.

THE material allegations of the bill are, that complainant and defendant, on the 15th December, 1840, entered into the following contract: The said Preston Capshaw, promises to pay to James W. Fennell, \$2,450, for which he has given his notes, half payable on the first of March, 1841, and the other half payable the first of March, 1842, for the tract of land on which said Fennell now lives, containing 300 acres, *more or less*, and the said Fennell hereby obligates himself, in the penal sum of \$4,900, to make unto Capshaw, a good title to said land. The bill also alledges, that previous to the sale, the said Fennell represented to the complainant, that the tract of land contained 300 acres, and attaches as an exhibit, a letter of the defendant, addressed to complainant, in which Fennell proposes to sell the land, and in this letter it is stated, that he owned 300 acres. The bill also alledges, that the complainant took possession of said land after the contract, and has paid the first note described in the contract, and the greater part of the second note, and on the 3d March, 1843, executed a new note for \$346, being the balance due on the second note, and to recover the residue, suit at law was brought by Fennell, against complainant. It is further

alleged, that the tract of land contained only 282 acres, and that this was known to Fennell at the time of entering into the contract, and of making the representation that it contained 300 acres. That the tract of land originally contained 304 acres, but that 22 acres were sold off, and detached from the tract before Fennell purchased it, and that the title deed, or bond for titles held by Fennell, showed the quantity to be 282 acres. The bill admits that complainants accepted a deed for the land, from one John Simmons, in whom was the legal title, which bears date the 22d March, 1842, and specifies the tract of land by metes and bounds, and states the quantity to be 304 acres, less 22 acres, particularly described, and previously sold to one Howell. The bill prays an injunction against the suit at law, for the recovery of the amount of the purchase money unpaid, and for compensation for the difference between 300 and 282 acres—the actual amount conveyed to complainant.

The answer admits the execution of the contract, and that the defendant represented to the complainant, that the tract of land contained 300 acres, but denies that he knew it contained less; or that he had in his possession any deed, or title bond that would show that fact; but states that he had no written title, or bond for title, and always believed that the tract of land contained 300 acres. Denies that the sale was by the acre, or that the precise quantity of land was the inducement to the contract; and insists on the reception of the deed, from Simmons, without objection, as evidence thereof. There was some testimony taken to show the quantity of the land.

HUMPHREYS, for appellant.

The vendee of land has a right to receive a title, so far as the vendor has title, and to demand compensation for such portion contracted to be sold, to which the vendor has no title. [2 Bibb, 410; Jones v. Shackelford, Marshall, 494; 9 Johns. 460, and many other cases.]

CLAY, for the defendant, contended—1. That the contract of sale was not by the acre, but a contract for the tract of

land, for a gross sum, and that as there was no fraud in the contract, the bill was properly dismissed.

2. That complainant having accepted the deed from Simmons, which showed the deficiency on its face, without objection, he could not now seek compensation for such deficiency.

DARGAN, J.—The contract in this case, was for the sale of a tract of land, containing 300 acres, *more or less*. The vendor represented to the vendee, that it contained 300 acres, when in fact it contained only 282 acres, but the sale was not expressly by the acre, but was for a gross sum, for the tract. The contract of sale was entered into in December, 1840, and a deed was made to the complainant by Simmons, in whom was the title, in March, 1842. The vendor never had any written title, and from the answer, and all the circumstances brought to the notice of the court by the record, we believe that the representation was innocently made. The defendant purchased the tract, and paid for it, supposing it contained 300 acres, and there is no evidence whatever to show, that he discovered the mistake, at any time previous to the final consummation of the contract.

The law is, that if the vendor makes false representations as to the quantity of land about to be sold, knowing them to be false, the vendee may have compensation for the deficiency. [2 H. & Mun. 160; Sugden on Vend. 391; Minge v. Smith, 1 Ala. Rep. 415.] But here the representation was innocently made, under the belief that the tract of land contained 300 acres. This was a mere mistake, not a fraud. When there has been a mutual mistake as to the quantity of land sold, it is difficult to lay down any precise rule, that will always guide us in determining when compensation will, and when it will not be allowed; but inasmuch as the complainant in this case, received the deed in March, 1842, and on the face of the deed, notice of the deficiency is fully given, a year afterwards he renewed his note for the small balance of the purchase money, without objection or claim for compensation, we believe, that if the true quantity had been known at the time of entering into the contract, to both parties, the terms of the contract would not have been altered

We arrive at this conclusion of fact, from the nature of the contract itself; from the conduct of the complainant in receiving the deed, which gives notice of the deficiency on its face, without objection; then a year after, as stated, renewing his note for the balance of the purchase money, then saying nothing of the deficiency. Also, the exhibits, being the letters of the defendant, show, that the locality was a leading inducement to the contract; and we cannot come to the conclusion that the terms of the contract would have been altered, had the true quantity been known. In this case, then, we cannot conceive how compensation can be allowed.

The decree therefore, dismissing the bill, was correct, and is hereby affirmed.

GRIFFIN v. DOE, EX DEM., STODDARD AND MURPHY.

1. A decree of the court of chancery, appointing a trustee to sue under a deed of trust, is final as to this matter, and binding alike on strangers, as on parties to the decree.
2. An objection that a deed was not proved, and recorded, within the time prescribed by law, cannot be made in the appellate court, if not raised in the primary court.
3. A deed of trust conveying land by the members of a mercantile company, for the payment of the debts of the partnership, and requiring the trustee to sell at the instance of any creditor of the firm, is founded on sufficient consideration; the company having gone into existence, contracted debts, and there being unsatisfied creditors of the firm.
4. A creditor of the firm, seeking to enforce a debt, cannot be required to produce the original articles of co-partnership.
5. An intention to defraud the public generally, by contracting debts, and circulating paper as money, upon the faith of real estate conveyed for the payment of such debts, and the redemption of such notes, will not render

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the deed, by which such real estate is conveyed, void, under the statute of frauds, unless there was an intention on the part of the grantor, to defraud, hinder, or delay, his own creditors.

6. In a contest between a purchaser from the grantor with notice of the deed, and a creditor of the firm seeking to enforce it, the former is in no better condition than the grantor.

Error to the Circuit Court of Tuscaloosa.

EJECTMENT by the defendants, against the plaintiff in error.

Upon the trial of the cause, as appears from a bill of exceptions, the plaintiffs, to show their right to sue, and in support of the issue, offered in evidence a decree, purporting to be made by the chancellor of the Tuscaloosa district, on the 10th November, 1842, in the case of Reese, et al. v. James McCown, and others, by which he appointed the plaintiffs, trustees, in the place of James McCown, to execute certain trust deeds described in the bill, and directing them, if necessary, to sue for, and recover the lands conveyed by the deed, to sell the same, and pay the proceeds over to the register, &c.

To the admission of this decree, the defendant objected, because at the time the same was rendered, the defendant was in possession of the land sued for, under a sheriff's deed, and yet was not a party to the suit in chancery, which objection was overruled, and the defendant excepted.

The plaintiffs then offered in evidence, a deed executed by Robert Oliver to James McCown, as trustee, conveying to him the land in controversy. The deed recites, that articles of association, and co-partnership, had been entered into on the 21st September, 1838, between Alexander McCown, Robert Oliver, and eleven other persons, for the purpose of buying and selling all kinds of merchandize, wares, and such other descriptions of real estate, and property, as the acting partners might deem for the interest of the concern, under firms, to be established by the members, in Tuscaloosa, New Orleans, New York, and Mobile," and whereas by the third article of said association, it is provided, that as a basis for the capital of the company, each individual member thereof, did agree to execute a deed of trust upon real estate, at cash

valuation, to a trustee to be appointed by the company, for the full amount of his investment, or share in the concern, and which should be unincumbered, and become pledged for the payment of all debts contracted by the co-partnership, and to pay into the concern, one per centum upon the amount of his investment, and such other cash payments, as might become essential in order to pay the debts, and provide for the engagements of the company," &c. Then follows, in consideration of the premises, and of ten dollars, paid by the trustee, a conveyance of the land to J. McCown, upon trust, that he should hold the land in trust for the payment of the debts of the co-partnership, and be liable for the same, as provided in the articles of co-partnership, and the trustee is required, at the request of any creditor of the firm, to take the land into his possession, and sell for the payment of said debts, &c.

This deed was proved by the subscribing witness, to have been executed on the day of its date, before the clerk of the county court, on the 8th December, 1838, and recorded, as appears from his certificate, but the deed set out in the record, is without date.

The plaintiff also introduced a judgment in favor of William Murphy, founded on a note made by Conrow, Ramsay & Co., which remained unsatisfied, to which the defendant objected, because the said William Murphy, was neither a party to this proceeding, or to the suit in chancery, but the objection was overruled, and the defendant excepted. The plaintiffs did not introduce the articles of co-partnership referred to in the deed, or show any consideration for it, other than the recitals in the deed, but it was proved that the co-partnership went into business.

The defendant, to show that the design of the company was to defraud the public, offered a witness, to prove, that those most active in getting it up, proposed to him, to join it, and explained to him, the object and designs of the company, Oliver not being present. The plaintiff objected to the admission of this testimony, the objection was sustained, and the defendant excepted.

The defendant further proved, that the company was com-

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posed for the most part of individuals in desperate, and embarrassed circumstances; that they resorted to various shifts, and devices, to circulate among the community, a large amount of paper, as money, which has not been redeemed. That the individual members of the company, including Robert Oliver, have all become insolvent, run away, or died.

Defendant further proved, that he had title to the land in controversy, by two deeds executed by the sheriff, on judgments against Oliver—founded, one upon his individual note, and the other upon a bill of exchange of the partnership. These securities were made previous to the deed of trust, but the sheriff's deed subsequent. There was evidence tending to prove, that Oliver was embarrassed when he made the deed.

The defendant moved the court to exclude from the jury, the deed from Oliver, to McCown, on the ground that the articles of co-partnership alluded to therein, had not been produced as evidence, nor any consideration for making the deed, except the recitals of the deed, and the fact that the partnership did business as such, which motion was overruled, and the defendant excepted.

Further, that the deed was fraudulent on its face, which the court refused to give, and charged the jury, that if the deed was made, to hinder, delay, and defraud creditors, it was void, and they should find for the defendant. To all which the defendant excepted, and now assigns as error.

P. MARTIN & HUNTINGTON, for plaintiff in error.

MURPHY, contra.

ORMOND, J.—The admissibility of the decree, removing James McCown from his trusteeship, and appointing the plaintiffs in his stead, is resisted on two grounds, first, because the decree is interlocutory only, and secondly, because the defendant to this suit, is not a party to the suit in chancery, in which the decree was made. Neither objection can prevail. This decree is to all intents final. It requires no further action of the court to give it validity, or sanction, but as it respects the appointment of the plaintiffs' trustees, to recover the land, is final and conclusive.

Nor is it a matter of any moment, that the defendant was not a party to the suit, as by no possibility could he be prejudiced by it. Whether this suit is prosecuted by the original, or substituted trustees, his rights under the deed are the same. The court of chancery never wants a trustee, and may appoint one on an *ex parte* application. In England, the usual course is, to refer it to a master, (Daniel's Ch. P. 1446) and in this State, it may be done by the register in vacation. [Clay's Dig. 350.]

The objection, that the deed does not appear to have been proved, and recorded, within the time prescribed by law, does not appear to have been raised in the court below, and therefore cannot be made in this court. If it had been made there, it might have been shown that although the date of the deed was left blank, it was in fact executed within sixty days of the time, when it was proved and recorded.

The objection to the deed as evidence, because as alleged, there was no proof of consideration beyond the recitals in the deed, is entitled to more reflection. The purpose of the deed, as declared on its face, was to make provision *for the future creditors of a firm, of which the grantor was a member*. It appears from the deed, that the partners were to put in but a small cash capital. The land thus conveyed in trust by this, and the other partners, was in fact the capital stock of the company, relied upon to give it credit, and upon which those willing to credit the firm, were invited to rely, as a fund for the payment of any debt the firm might incur. It was, in effect, putting the land into the partnership, as stock, upon which it was to deal, and in fact pledging it for any debt the company might create. It was proved that the firm went into operation, and transacted business as a mercantile company, and that there are judgment creditors of the firm, whose debts are unsatisfied. It appears to us very clear, that this is not a voluntary deed, but is one founded upon a valuable consideration. It has been held by this court, that a deed executed to secure a contingent liability, as for example, to secure the surety of an executor, or administrator, would be supported, and surely a conveyance of property for the payment of debts, about to be created, is not entitled to less favor.

Nor could the plaintiffs be called on to produce the articles of co-partnership, referred to in the deed of trust. They were not entitled to the custody, and cannot be presumed to have the possession of this paper, the private property of the partnership, and cannot therefore be required to produce it. Although as between the partners, the articles of co-partnership might be the highest evidence of the existence of the partnership, strangers cannot be held to this proof, but may prove its existence, when proof of that fact is necessary, by any other competent testimony. After what has been said, it is scarcely necessary to add, that there was no objection to the proof, that there were unsatisfied judgment creditors of the firm. Indeed, without this proof, it might well be doubted, whether the trustees could have maintained this action, it being shown that the defendant was a purchaser at sheriff's sale, under a judgment against the grantor individually.

The remaining question, is one of great novelty, and some difficulty. The defendant offered to prove the admissions of some of the company, whilst it was in process of formation, that its design was to defraud the public. This testimony was rejected, as it appears, because Oliver, the maker of the deed, was not present, when these admissions were made, but if the testimony was inadmissible, it is unimportant what reason was assigned for its rejection.

From the deed itself, and the evidence adduced in the court below, we are led to the conclusion, that what is called a "fraud upon the public," was, that the design of this, and the other deeds executed by the company, was to give it a delusive credit, and to enable it to circulate its own notes, as money, and in other modes to obtain a credit, utterly disproportionate to the means provided for their redemption, and payment—and that they did by various devices, contrive to circulate in the community, a large amount of paper as money, which has never been redeemed. This being the purpose and design of the deed, it is argued, renders it fraudulent and void.

The statute of frauds of this State, contains the substance of the provisions, both of the 13th and 27th of Elizabeth: the former being intended for the protection of creditors against fraudulent conveyances. The creditors here spoken

of, are the creditors of the grantor, or donor, making such fraudulent conveyance, and as to them, if the intention was to hinder, delay, or defraud them, the statute declares the conveyance to be utterly void; and by a long series of decisions, the courts have held, that if the consideration is voluntary, the deed is fraudulent, and void, as against the existing creditors of the donor. We have seen by the previous examination of the question, that this deed, made for the protection of the future creditors of the firm, is not voluntary, but founded on a valuable consideration, and the question, whether it was made with intent to hinder, or delay creditors, was fairly left to the jury, and their verdict has ascertained, that it was made *bona fide*, that is, that it was not made, with intent to hinder, or delay the creditors of the grantor.

Conceding then, that the grantor meditated a fraud upon the public, by which must be understood that portion of the community, who could be understood that portion of the receive its notes as money, the deed is nevertheless a valid security for them, and cannot be impeached for fraud, by a purchaser from the grantor, with notice of the conveyance, either actual, or constructive, from the registration of the deed, pursuant to the statute. The case then, is that of a purchaser from the grantor, insisting that a deed is void as to him, because the maker of the deed contemplated a fraud upon other persons, in a conveyance professedly made to secure them from loss, and which they are desirous to enforce according to its terms. In such a contest, the purchaser with notice of the deed, can be in no better condition than the grantor—and as the latter could not controvert the deed, neither can he. It is of no moment, that the defendant, by his purchase at sheriff's sale, connects himself with the title of the creditor. The plaintiffs also represent the creditors of the grantor, and in addition, are clothed with the elder legal title.

Judgment affirmed.

COOPWOOD, ET AL. V. WALLACE.

1. Counsel, who with the consent of the client, withdraws from a case, after having rendered beneficial services, does not thereby lose his right to compensation for the services rendered, unless at the time of his withdrawal, he waives, or abandons his claim to compensation.
2. An attorney at law, who at the instance of the administrators of an estate, has rendered valuable services to the estate, may proceed at once against the estate in equity, to recover his fee, without previously suing the administrators at law, one having removed from this State, and the other being insolvent; and neither having made any charge against the estate for the attorney's fee.
3. An attorney at law cannot recover more than he agreed to receive, by proof that his services were worth more.

Writ of Error to the Chancery Court of the 30th District, Northern Division.

THE defendant in error filed his bill against James M. Coopwood, Bennett Driver, and Samuel Henderson, the material allegations of which are, that Coopwood, and Driver, in the year 1836, were appointed administrators of the estate of John Reynolds, by the orphans' court of Lawrence county. That it became necessary to employ counsel to bring suits, to recover the property belonging to said estate, and that complainant was employed by them to bring these suits for the recovery of some slaves. Also, that complainant was employed to aid, by his counsels and advice, the said Coopwood and Driver in the administration of said estate. That he prepared two of the cases before mentioned for trial, procured the testimony necessary to establish the right of the plaintiffs, as administrators, by taking the depositions of witnesses living in Mississippi, Tennessee, and Alabama; that at the trial of the cases, he was absent, but A. F. Hopkins and Wm. Cooper, acted as the counsel of said Coopwood and Driver, and recoveries were had for twenty-two or three slaves.

That his services in conducting these cases, and preparing them for trial, were worth \$250, and his services in attending to the business of the estate, in the orphans' court were worth \$50. That said Coopwood and Driver have paid him nothing; that they are both insolvent, and that Coopwood has removed from the State. That Henderson was appointed administrator *de bonis non* of said estate, and came into the possession of said slaves, and is possessed of the goods of the estate; and prays that the assets of said estate may be subjected to the payment of his demand. Henderson and Driver were served with subpœnas, and answered the bill, Coopwood was made a party by publication, and a decree *pro confesso* taken against him.

The answer of Henderson admits, that he was informed, and believed, that complainant was employed to bring the suits; but that in some short time afterwards, he was appointed clerk of the supreme court of the State of Alabama, and removed from Moulton to Tuscaloosa, being about 110 miles from the former place; and that complainant informed Coopwood and Driver, that owing to his removal, he could not attend further to the suits, and he would not charge any fees for the services he had rendered. That Hopkins and Cooper were employed by Coopwood and Driver, who took charge of the suits, and complainant rendered no further service in the prosecution of the suits. He admits he was appointed administrator *de bonis non*; and that he, as such, is possessed of considerable personal property belonging to said estate. Henderson obtained leave, and filed an amended answer, in which he insists on the statute of limitations of three years as a bar to the demand.

The answer of Driver admits the employment of complainant, and that the suits were instituted about the year 1838, but that shortly after complainant was appointed clerk of the supreme court, removed to Tuscaloosa, and informed said Driver, and Coopwood, that he could not further attend to said suits, and advised the employment of other counsel, and recommended the employment of A. F. Hopkins to attend to the suits; and then informed the said Coopwood and Driver, that he would not charge the estate any thing for the

services he had rendered the estate ; and states that complainant never gave any further attention to said suits, or if he did, it was merely gratuitous, and not at the request of either Driver, or Coopwood. That two of the suits have been tried, one in March, 1841, the other in 1842, and denies that the suits were managed and prepared for trial by complainant. Driver denies that he is insolvent, and also insists that Coopwood was solvent when he left the State.

Mr. Ligon, a witness, states, that he was employed to defend the suits ; that they were brought by complainant, to the September term, 1838. That he attended to them alone, some three or four years—filed declarations, and examined the witnesses, where testimony was taken by deposition. That the cases were finally tried by Hopkins and Cooper. This witness estimates the value of complainant's services, in conducting the suits, procuring the testimony, &c., at \$250 ; and thinks that Driver and Coopwood are reputed insolvent.

Jackson, another witness, states, about the same as to the bringing of the suits ; and also, that Driver and Coopwood, are reputed insolvent.

William Cooper states, that the suits were brought by Wallace. That Hopkins, Wallace, himself, and Coopwood, had an interview in reference to the fees. That Coopwood was unwilling to pay more than \$400, that he proposed to withdraw, but Wallace said that he would, inasmuch as he had to be at Tuscaloosa. The next day Coopwood and Driver were removed, and Henderson was appointed administrator *de bonis non*. Henderson executed his two notes, for \$200 each, one to Hopkins and one to Cooper—this was in March, 1841—and complainant then withdrew from the cases, upon what terms witness cannot state, but it was by consent of all parties. Nothing was said as to his abandoning his fees for the services rendered.

James M. Coopwood states, that complainant was employed by Driver, and attended to the suits. Has no recollection that complainant abandoned them. Some time after the suits were instituted, Driver called on witness to go to the room of Hopkins and Cooper, to settle the amount of fees to be paid ; witness objected to the number of counsel, and the

amount of fees. Driver then stated that Wallace would withdraw from the cases, as he would be at Tuscaloosa. To this Cooper objected, but the witness does not recollect that they came to any definite conclusion, or that Wallace abandoned the cases.

Mr. Isbell also was examined, and states, that Driver had some property about him, a small portion of which is liable to the payment of his debts.

James M. Reynolds states, that he was present when complainant was about to remove to Tuscaloosa, and heard him say to Driver, that the distance was so great from Tuscaloosa to Moulton, he could not attend farther to the suits, and advised the employment of Mr. Hopkins. This witness also states, that Driver and Coopwood are solvent, in his opinion.

Another witness gives it as his opinion that Driver is solvent.

The chancellor rendered a decree in favor of complainant for \$250, besides interest.

The errors assigned are—

1. The court erred in refusing to dismiss the bill for want of equity.
2. The court erred in refusing to dismiss the bill as to the defendant, Driver.
3. The court erred in decreeing against Henderson.
4. The court erred in refusing to sustain the statute of limitations.
5. The court erred in rendering a decree upon insufficient evidence.

PETERS, for plaintiff in error, insisted, that the motion to dismiss the bill for want of equity, should have been sustained. That if complainant had any demand, it was against Driver and Coopwood, at law. That an administrator could not create a charge against the estate he represents, and cited 9 Ala. Rep. 334. At all events, if there was any debt due complainant, Driver and Coopwood were liable for it at law, and that this legal remedy should have been exhausted, before resort was had to equity.

2. That the debt was barred by the statute of three years.

That the evidence showed, that there was no debt due complainant for services rendered, and because complainant abandoned the cases, and abandoned all claim to fees, or compensation.

L. P. WALKER, for defendant in error, contended, that the bill was properly filed. That the services were rendered for the benefit of the estate, and that complainant had the right to elect his remedy, either against Coopwood and Driver, at law, or to file his bill to charge the estate.

2. The debt was not barred, as the cause of action did not accrue until 1841.

3. That the evidence established the debt.

DARGAN, J.—The first question to be determined is, does the evidence show, that there is due the complainant any debt? He was employed to bring three suits, by Coopwood and Driver, an administrator of Reynolds in 1838—one writ has never been executed; two were; he prepared the two causes for trial, attended to the taking of the depositions of witnesses, in Mississippi, Tennessee, and Alabama: that is, he prepared all the papers necessary to their examination. The suits were much litigated; two other counsel were employed, Mr. Hopkins, at the suggestion of the complainant, and Mr. Cooper, by the administrator; when they were retained, is perhaps uncertain, but it does not appear that either of them rendered any service, except to try the cases. The complainant seems to have prepared the cases for trial alone.

In March, 1841, Coopwood and Driver, the administrators, had an interview with Cooper, Hopkins, and complainant, in reference to the fees to be paid. Coopwood objected to the number of counsel; each one demanded \$200. It was then agreed, that complainant should abandon the cases, as he had removed to Tuscaloosa. He did so with the consent of all; the parties then separated, but nothing was said about complainant's abandoning his claim for compensation, for the services performed. The two suits were tried by Mr. Cooper alone, and twenty-two or three slaves were recovered, and about \$1,000 by way of damages. Before the trial, how-

ever, and in a day or two after the interview, Driver and Coopwood were removed from their office as administrators, and Henderson was appointed administrator *de bonis non*, and as such, has paid Cooper and Hopkins \$400 fees. This is all that has been paid. If complainant had abandoned the cases without the consent of Driver and Coopwood, he would have lost all claim to compensation for the services rendered; but if he has rendered services valuable in their character, and then withdrew from the cases, with the consent of Driver and Coopwood, because of his removal to Tuscaloosa, and the number of counsel retained, he would not lose his right to reasonable compensation, unless this consent was obtained upon condition that he would abandon his claim to fees, or unless he expressly waived his claim to fees. It does not appear, that the consent of Driver and Coopwood was obtained to his withdrawing from the cases, upon condition that he would abandon his claim to reasonable compensation. And although it is set up in the answer of the defendant, Driver, as well as that of Henderson, who answers from information and belief, that complainant did agree to abandon all claim to fees, yet there is no witness who testifies that complainant did expressly agree to give up all claim to reasonable compensation. Mr. Cooper only states, that complainant withdrew from the cases with the consent of all; and Reynolds states that he heard complainant say to Driver, that he could not further attend to the cases, as he had to be at Tuscaloosa. This was however long before the interview before alluded to. The allegation, therefore, that he did agree to abandon, or give up his fees for the services rendered, is not, in our opinion sufficiently proved; and it is not responsive to the bill, and therefore is required to be proved. We come therefore to the conclusions of facts, that complainant rendered valuable services to Coopwood and Driver, in preparing the two cases for trial, that he withdrew under the circumstances alluded to, with the consent of Driver and Coopwood, and without abandoning his claim to fees, for the services actually rendered, and which have been highly beneficial to the estate of Reynolds.

2. The next question is, is there equity in the bill, or can the estate of Reynolds be charged with the debt of complain-

ant, directly, now in the hands of Henderson, the administrator *de bonis non*?

It is clear, that Coopwood and Driver, as the administrators of Reynolds, are liable at law for complainant's debt, as it was contracted by them, and it is objected, that administrators cannot contract a debt that will be a charge on the estate of the intestate, and we are referred to the case of Willis' Adm'r v. The Heirs of Willis, 9 Ala. Rep. 334, as decisive of this question. By reference to that case, it will be seen, that the debt which the administrator attempted to charge upon the estate, was for the board and support of the minor children, after the death of the intestate, and it is clear to all, that the estate of an intestate cannot be charged with a debt of this character. Although the minor children may be charged respectively for necessary support, and this charge may be enforced against each child, yet the estate of their ancestor, as such, cannot be thus charged. Yet this decision does not deny, that the estate of a decedent must bear the expenses necessary to its proper administration. That an estate must bear the burthen of its administration, is a self evident truth, and it is clear, that the debt due complainant was properly created for the benefit of the estate, and in due course of administration; for it is the duty of an administrator to sue for, and recover, the goods of the intestate, and the expenses arising from carrying on the suits, and recovering the goods, is a proper charge against the estate.

But it is objected, that although the estate may be bound to bear these expenses, yet the complainant can look to Driver and Coopwood alone, at law, for payment of his debt. This would be true, if the estate of Reynolds had ever borne the burthen of this debt. That is, if Driver and Coopwood, because of their liability to complainant, had charged this debt to the estate, and that charge had been allowed. But it is not pretended that this is the case, or that the estate in any manner has ever paid it.

3. This being the case, can the complainant come into equity, in the first instance, without suit at law against Driver and Coopwood, to subject the estate to the payment of this debt? We will not determine, whether this would be permitted, if Coopwood, and Driver, both resided in this State, and were

solvent. But Coopwood has removed from the State, and Driver we believe to be insolvent, and that a suit at law against him would be fruitless. We will not therefore, drive the complainant to a foreign jurisdiction against Coopwood, nor to a fruitless suit at law, against Driver; but will let him proceed directly against the estate of Reynolds, which is bound to pay the debt ultimately. The propriety of this course is sustained, by the law of Nelson, Carleton & Co. v. Gray's adm'rs, et al. 5 Howard S. C. Rep. That was a case of a bill against Hill, surviving partner, and also against the administrators of Gray, seeking to enforce collection of a partnership debt, that had been contracted by the firm of Hill & Gray. Hill was insolvent in fact, but no suit at law had been brought against him. The supreme court sustained the bill, reversing the decree of the circuit court, that had allowed a demurrer, because no suit at law had been prosecuted against the surviving partner. We come therefore to the conclusion, that the bill was properly filed, and under the authority of the case referred to, and the cases therein cited, we think it was proper to make Driver and Coopwood parties to the bill, although no decree could be rendered against them, as the remedy as to them was at law.

4. The statute of limitations of three years is relied on, but the cause of action did not accrue until the complainant withdrew from the cases; this was on the 15th March, 1841, as is shown by the testimony of Cooper, and the bill was filed in 1843, therefore the debt is not barred by the statute.

5. The only remaining question, is, as to the amount that should have been allowed complainant. The chancellor allowed \$250, besides interest. The testimony of Mr. Ligon goes to show, that this is a reasonable amount, but the testimony of Mr. Cooper, and also of Coopwood, shows, that at the time the complainant withdrew from the cases, and at the time Driver, Cooper, Hopkins, complainant, and Coopwood, had an interview to settle the amount of fees, it was thought that \$200 each, would be fair compensation. Complainant has done nothing since, towards the prosecution of the suits; and did not then expect, perhaps, further to attend to them; and if he then estimated his services at \$200, they ought still to be so estimated. We therefore think, the chancellor erred

in allowing \$250, with interest. His decree is therefore reversed, and a decree will be here rendered, in favor of complainant, for \$200 for his debt, and \$64 interest thereon, from the time the bill was filed. Samuel Henderson, as administrator, will pay the cost of this suit in the court below, and the defendant in error will pay the cost of this court.

CLARKE & CO. v. WINDHAM.

1. A will conveying property to a married woman, by the terms, "I leave for her use and benefit, as he (the trustee) may think proper, and best, without being subject to her debts, and contracts, in any way whatsoever, or her husband, or any future husband, solely for her support, her lifetime," creates a separate estate in the property, in the wife—*Quere*, will not the prohibition against her charging the estate, by contract, during the coverture be enforced.
2. After the coverture has ceased, a woman may be proceeded against at law, for a debt which she owed previous to the marriage.
3. The interest of one in possession of personal property, may be sold under execution at law, though the legal title is outstanding in a trustee.

Writ of Error to the Circuit Court of Pickens.

TRIAL of right of property. The plaintiffs in error sued out execution on a judgment, against James, and Elizabeth Tanner, which was levied on certain slaves, claimed by the defendant in error as the trustee of Elizabeth Tanner.

Upon the trial, the claimant read the clause of a will, made by R. Windham, which reads thus: "I give and bequeath, unto my daughter Elizabeth Reed, the use of three eighty acre tracts of land, (described particularly) said land to be under the superintendence of my son Levi B. Windham, who I appoint as guardian, to manage and control all the property, I leave for the use and benefit, as he may think proper, and best,

Clarke & Co. v. Windham.

without being subject to her debts, and contracts, in any way whatsoever, or her husband, or any future husband, solely for her support, her life-time. And if the said Levi B. Windham may think it best to sell the land above mentioned, and and buy other land elsewhere for her use, he is authorized under this instrument to do so, and apply the money to the purchase of the same, and any other means I may leave for her support. Also, I place in his hands the other third of all my personal, and perishable property, not otherwise disposed of in said will, to be put on said land, and employed there as he may think best for her support solely, for her life-time, and after her death, to be equally divided between her lawful children."

It was proved that the slaves levied on were, at the time of levy, and had been for some time previous, on a tract of land rented by claimant, about four miles from Fairfield, where Elizabeth Tanner resides, James H. Tanner having left the country. That the said Elizabeth received her supplies from the plantation so rented—sent rope, bagging, and such like articles to it, and attended to the negroes when sick. That Mrs. Tanner, was the Mrs. Reed mentioned in the will, and that the slaves levied on were part of the property left by the will, and which had been distributed under the will, and that the claimant had qualified, and was acting as executor under the will.

The court charged the jury, that if the slaves levied on were part of the estate of the testatrix, and had been divided, and set off under the will, they were exempt from levy by execution at law, for any debts of Mrs. Tanner, and not subject to their payment.

This was excepted to, and is now assigned as error.

HUNTINGTON, for plaintiff in error.

BRODIE, contra.

ORMOND, J.—'The clause of the will which has been re' cited, is quite sufficient to establish the intention of the testatrix, to create a separate estate in Mrs. Reed, her daughter, who it appears was then a married woman, in the property

during her life. It is given to the claimant by language, which though in artificial, creates a trust *for her use, and benefit not subject to her debts, or those of her husband, or those of any future husband, solely for her support.* Although the technical words, for her *sole and separate use*, are wanting in this bequest, we think it impossible to doubt what was the intention; and any language clearly indicating the intent to exclude the marital rights of the husband, will be sufficient to create a separate estate in the wife.

In *Newman v. James*, at the last term, we had occasion to consider this question, and we then held, that the words, "without let, hindrance or molestation whatever," applied in the conveyance to the enjoyment of the property by the wife, created a separate estate, as they clearly indicated that the husband was not to have control, or dominion over the property. The language here employed, though very inartificial, indicates very clearly, that it is for the sole use, benefit and support of the wife, and that the husband shall not charge it, nor shall it be chargeable for his debts, which is wholly inconsistent with his exercising any right over it. In *Kennerly v. Smith*, at the last term, this question was so fully considered, that we shall abstain at this time from any further examination of it.

It is also equally certain, that it was intended to create an estate in the wife, inalienable by her, and which she should not by any act of hers, charge for the payment of her debts. Whether this incident of a separate estate in a married woman is a legal limitation in this country, we shall not at this time undertake to decide, as that question has not been argued. Such a limitation on the estate of a married woman, has been held legal in England, in the recent case of *Tullit v. Armstrong*, 1 Beavan, 3. It may perhaps be well doubted, whether such a limitation upon the estate, would continue after the death of the husband, or separation of the husband and wife.

It does not appear from the record, whether Mrs. Tanner, is a married woman, but it is admitted here that such is the fact. It is also stated on the record, that the husband has

left the country, but whether under such circumstances as would justify the inference, that she was abandoned by him, and could therefore be treated as a *feme sole* does not appear. The judgment it appears was against the husband, and wife, and we cannot comprehend how this could be, unless it was for a debt due by her previous to the marriage ; and if the facts of the abandonment were such as to justify her being treated as a *feme sole*, it would seem, that the debt which had been suspended against her during the coverture, was revived against her by the abandonment of the husband, precisely as it would have been by his death. See the authorities collected in Clancy on Rights, 13, and Woodman v. Chapman, 1 Camp, 189. She appears to have been considered, and treated as a *feme sole*, in the court below, and it is proper we should so consider her here. So considered, although during the coverture she could not be sued at law, in respect to her separate estate, yet after the coverture ceases, no such disability exists, nor is there any necessity for a resort to chancery to make her liable on her contracts. If she was in possession of this property, although the legal title is outstanding in another, her possessory interest may be sold. This point has been decisively settled in this court, by the case of Nelson, Carleton & Co. v. Banks, 7 Ala. 32, and in many other recent cases, especially in Kennerly v. Smith, *supra*, where all the cases are cited.

From this consideration, it appears, that treating the defendant as a *feme sole*, the court erred in its charge to the jury. Whether she had the possession of this property, or not, was a question for the determination of the jury. If she had, and can be treated as a *feme sole*, then she is liable at law, though the legal title is in another, and she has but a life estate in the slaves, and other property.

Judgment reversed and cause remanded.

POSEY AND COFFEE, EX'RS, v. THE DECATUR
BANK.

1. The six months which elapse after the granting letters testamentary, or of administration, are not to be computed in ascertaining whether the period prescribed by the statute of limitations as a bar, is complete.
2. A statement in writing, describing a bill of exchange by its date, amount, and the character each party on the bill bears in relation to it, and when, and where payable, with the addition that the holder looks to the estate of a particular person for payment, is, if presented to the personal representative of the estate, a sufficient presentation, without producing the original bill.
3. An agreement entered into by a bank, the holder of a bill of exchange, with the acceptor, that if the bill is not paid at maturity, his credit shall not suffer in bank, will discharge an indorser on the bill, who has no knowledge of, and does not consent to the arrangement. But where the indorser has been fully indemnified by the drawer, for whose use the bill was made, indorsed and accepted, he could not avail himself of the want of notice of the dishonor of the bill, or of an arrangement between the holder, and acceptor, which would otherwise have discharged him from liability to the holder.
4. Parol evidence is admissible to show, that a particular bill of exchange was intended to be secured by a deed of trust, though generally, or improperly described in the deed.
5. A suit cannot be maintained at law, on a lost bill of exchange, indorsed in blank, whether lost before, or after its maturity, unless an affidavit of the loss be made before suit is brought, as required by the act of 1828. Nor is the case varied by the fact, that the bill was drawn in sets, consisting of first and second, and that the first only, on which the protest was made, is lost, and the second is produced at the trial.

Error to the County Court of Lauderdale.

THE plaintiff below, declared against the defendants, on a bill of exchange, dated 29th August, 1838, due at nine months, drawn by P. F. Pearson, directed to Kirkman, Abernathy & Hanna, New Orleans, indorsed by Donelson and the defendant's testator, and accepted by the drawees.

The declaration contains several special counts on the bill,

describing it as drawn in sets, the first and second. The defendants pleaded several pleas—the general issue—the statute of limitations of six years—and that the plaintiff did not present said claim to the defendants, as executors, within eighteen months from the time of granting letters testamentary to them as executors. To the plea of the statute of six years, the plaintiff replied, that Andrew J. Hutchings, the defendants' testator, departed this life on the — day of January, 1841. That on the 25th day of January, 1841, letters testamentary, were granted to the defendants, and that the time, from the accruing of the cause of action until the death of Hutchings, and the time from six months after the date of the grant of letters testamentary to the defendants, added together, do not make six years, to which replication the defendants demurred, and the demurrer was overruled, which is assigned as error.

The plaintiff, to the plea of non-presentation of the claim, within eighteen months, replied, taking issue thereon. The issues being submitted to a jury, the plaintiff offered the second of exchange as evidence, and introduced proof, that the first of the set, which was accepted and protested, was lost. The defendants moved the court to dismiss the suit for want of jurisdiction, which motion was overruled. He then objected to the introduction as evidence of the second of exchange—the proof of the loss being, that it was handed to the attorneys of the bank, and it could not be found. The court overruled the objection, and also overruled a motion to dismiss the suit, because the second of the set was read as evidence.

It was shown that the bill was discounted by the bank, for the benefit of Pearson the drawer, and that it was accepted by Kirkman, Abernathy & Hanna, and indorsed by Donelson, and the defendant's testator, for the accommodation of Pearson. That soon after the bill was discounted by the bank, Pearson being in failing circumstances, one of the firm of Kirkman, Abernathy & Hanna, applied to the bank, to have the acceptance cancelled, which was refused. It was then agreed, between the bank, and Kirkman, Abernathy &

Hanna, that the bill should not be sent to the bank in New Orleans, with which the plaintiff did business, but that it should be sent to Martin, Pleasants & Co.; and further, that if the bill should not be paid at maturity, under the peculiar circumstances of the case, the credit of the acceptors should not be injured in the bank. That in consequence of this agreement, the bill was sent to Martin, Pleasants & Co., and was indorsed to them by the cashier of the bank, as appears from the evidence of the notary, thus, "pay to Martin, Pleasants & Co., or order, S. O. Nelson, cashier," but the defendant's testator was ignorant of this agreement. The bill was not paid, and the first of the set, which was the one accepted, was protested for non-payment, and notice given to the defendant's testator. There was also proof tending to show, that if the bill had been sent to the usual agents of the bank in New Orleans, and presented by them, without notice of this agreement, it would have been paid by the acceptors. The plaintiffs also introduced a deed of trust, executed by Pearson, Willis Pope, and Andrew J. Hutchings, the plaintiff's testator, dated the 17th October, 1838, conveying to Willis Pope, by Pearson, his debts, stock of goods, &c. in trust, first to pay the debts of said Pearson, on which Hutchings was liable, and described two bills of about \$4,500 each, one discounted in a bank at Nashville, and accepted by Maunsel White & Co., the other accepted by Maunsel White & Co. or Kirkman, Abernathy & Hanna; the other debts are described, as debts of Pearson extended under the act of 1837, about \$5,000, the bill sued on not being described in the deed according to its terms, but the deed expressed, that Hutchings was liable for about \$15,000 for him. The plaintiff then introduced the testimony of Willis Pope, who stated, that it was intended by this deed to protect Hutchings from the debt sued on, and his testimony further tended to show, that the fund was ample, to pay all the debts, that Hutchings was liable for on account of Pearson, and that he had appropriated about \$3,000, under Hutchings's directions, to other debts. The testimony on the plea of non-presentation within eighteen months, was, the bank made out a list of debts, on which Hutchings was liable, and the bill sued on is described, as a bill for \$4,000, dated 29th August,

1838, due at nine months from date, drawn by P. F. Pearson, accepted by Kirkman, Abernathy & Hanna, indorsed by Donelson, and defendant's testator. To this testimony the defendants objected. The objection was overruled. This is the substance of the various bills of exceptions, and the court was requested to charge the jury, that if they believed, that the plaintiffs made the agreement with the acceptors, that their credit should not be affected in bank, although the bill was protested, that this agreement released the defendant's testator. Second, that if they believed that but for the agreement, that the credit of the acceptors should not be affected in the bank; if the bill was not protested, that the bill would have been paid at maturity, then the defendant's testator was discharged; both of which charges were refused.

A verdict and judgment being rendered for the plaintiffs, the defendants assign as error, the matters arising upon the bills of exceptions.

L. P. WALKER, for plaintiff in error.

1. The demurrer to plaintiff's replication to the plea of the statute of limitations should have been sustained. The right of action accrued on the 1st of June, 1839. The suit was brought on the 8th of July, 1845, being one month more than six years after the accrual of the cause of action. Hutchings died in January, 1841, and on the 25th of January, 1841, letters testamentary were granted. The period of six months within which no suit could be brought against his executors expired on the 25th July, 1841. And the defence relied upon in the replication, to avoid the operation of the statute of limitations, is, that the periods of time from the 1st of June, 1839, to January, 1841, and from 25th July, 1841, to the 8th of July, 1845, do not together amount to six years—in other words, that the statute was suspended from the time that Hutchings died, until six months after the grant of letters testamentary. But the statute of limitations having begun to run during the life of Hutchings, no subsequent disability can affect its operation. [8 Ala. 254; 15 Johns. 169; 18 John. 40; 2 Arch. N. P. top p. 153; 1 Stew. 254; Smith on Con. 141, and note; 8 Ala. 388; 4 Meeson & Welsby,

651; 6 Ibid, 351, 356; 2 Mann. & Granger, 414; see also Decatur Bank v. Donelson, adm'x, decided at this term.]

The case cited from 8 Ala. 254, certainly overrules the two previous cases in 2 Porter, 44, and 3 Porter, 247; for the doctrine is there emphatically adopted, that "it is a rule applicable to all statutes of limitation, and to which there is no exception, that where the right of action has once accrued, no subsequent disability will stop or suspend the operation of the statute." [Bank v. Donelson, *supra*.] The language of the statute to which that decision particularly has reference, (Clay's Dig. 327, § 83) is much more favorable to a construction which would allow subsequent disabilities to affect its operation, than that by which this case is governed. [Clay's Dig. 326, § 78.] For in the former, the proviso expressly provides that the time during which the party is infant, lunatic, &c. "shall not be computed as part of the limited period;" while in the latter, the language is without proviso or qualification, "that the action shall be commenced within six years next after the cause of action accrued, and not after." It certainly does not matter whether the disability to sue grows out of express statutory enactment, (as here) or out of the established rules of the common law, (as in the case of infants and insane persons.) For the fact in both cases is the same—the inability is as absolute in the one as the other, and it is totally immaterial, whether it be the result of a *lex scripta* or *non-scripta*.

2. The facts disclosed in the bill of exceptions show, that the court had no jurisdiction. The bill having been lost at the time suit was brought, the filing of an affidavit of its loss, is by our statute (Clay's Dig. 382, § 9,) made a pre-requisite to the bringing of the action, the object of that statute being to furnish information to the defendant of the loss of the instrument. [6 Ala, 843.] Until the passage of the act, *supra*, authorising suit on lost bonds, &c., the jurisdiction of chancery was exclusive. (2 Stew. & P. 251; 1 Story's E. 97 to 103; 2 Greenl. Ev. § 156, note 8; Story on Bills, 448, note 1.) And the proof, as recited in the bill of exceptions, showing that the bill was lost at the time suit was brought, *eo instanti*, the jurisdiction of the court was gone—there hav-

ing been no affidavit of the loss made before the issuance of the writ.

Although all the several sets of the bill collectively form but one bill, yet it is clear the right of action, and the rights of the acceptor or indorser, attach only to the particular number of the set protested. They are divided into sets, merely for the purpose of providing against loss before presentment. When either one of the set is presented, and either accepted or dishonored, all of the others become mere waste paper, and need not be produced at the trial, as the party accepting is liable only upon the number of the set accepted. The indorser is entitled to the identical number of the set protested, before he is bound to pay. [3 Kent, 108 ; 1 Johns. Cases, 107. Downes v. Church, 13 Peters, 205 ; Wells v. Whitehead, 15 Wend. 527 ; Story on Bills, § 66, 67, 226 ; Beawes 420, 424, § 74 ; 10 Barn. & Cresw. 449.]

As the right of action attaches to the identical number of the set protested, that number constitutes the bill to be sued upon ; and if lost, must be governed by the statute in regard to suits upon lost instruments.

The following passage from Chitty seems to be conclusive of this question : " It is laid down, that unless the drawee has accepted another part of a bill, he may safely pay any part that is presented to him, and that a payment of that part will annul the effect of the others. But that if one part has been accepted, the payment of another unaccepted part will not liberate the acceptor from liability to pay the holder of the accepted part. And such acceptor may therefore refuse to pay the bearer of the unaccepted part, and may compel him, if he suggests that he has lost the accepted part, to find caution or sureties against his liability to pay the accepted part. [Chitty on Bills, 175-6 ; 1 Pardessus, 433.]

Now it is clear that a court of law could not compel the holder to give such sureties, and the remedy is only in chancery, unless it is given by the act before referred to, and if it is the requirements prescribed by the act, (it being one in derogation of the common law) must be strictly complied with by the holder—i. e. an affidavit of loss of the accepted part, must be made before the issuance of the writ.

3. It follows, if an affidavit of the loss was necessary, that

there should be an allegation in the declaration of the loss, and that an affidavit was duly made. There being no such allegations, the proof recorded in the bill of exceptions, showing loss, was clearly inadmissible. As the plaintiff could legally prove no material fact, which the declaration does not alledge. [Greenl. Pl. 170, § 7.] All the forms of declarations upon lost bills, to be found in the books, contain an averment of the loss. [3 Stewt. 31 ; 7 Ala. 42 ; 3 Cowen, 303 ; 10 Johns. 104.] The loss of the bill and the affidavit, being ingredients of the plaintiff's right of action, must be averred in the declaration. [Clay's Dig. 333, § 112 ; Gould's Pl. 173, § 8.] And not being averred, they could not be proved.

4. The evidence of Pope, that Hutchings & Pearson intended to include this bill as a claim to be secured by the deed of trust, was inadmissible. [3 St. 140, 201 ; Gayle, et al. v. Hudson, et al. 10 Ala. 116.]

But conceding that the statement furnished by the bank to Posey, of the liabilities of Hutchings, was a sufficient presentation to take the case out of the statute of non-claim, still as the facts are, it will not do, for the abstract states that "the bill is payable in New-Orleans," when the bill given in evidence shows that it was not. This variance is fatal.

5. The proof of presentment of the claim within eighteen months was not sufficient. The presentment should have been of the claim itself, or an abstract. It is not enough that the executors knew of the existence of the claim. Nor could he, by his admissions, dispense with the necessity of a proper presentment,

The statute requires that the claim shall be presented, and nothing short of the claim will do. [2 Stewt. 445 ; Jones' ex'rs v. Lightfoot, 10 Ala. R. 17 ; Boggs, adm'r v. Bank Mobile, 10 Ala. 970.]

6. The point raised by the charges asked and refused, is *res integra*, having never been decided expressly, either one way or the other. It is therefore to be decided by the general principles governing the duties and liabilities of holder and indorser. It is very different from the case of an agreement by the holder to give time to the acceptor, in which case there must be a valuable consideration for the contract.

For this is after the liability of the indorser is fixed by presentment and due notice. In this case though, the agreement, which it is insisted, discharged the indorser, took place before the indorser's liability had been fixed, and was connected with the legal steps requisite to convert it from a contingent into an actual liability. Now, what is the contract of the indorser, and what are the duties of the holder ?

“The indorser of a bill undertakes that the drawee will, upon due presentment of the bill to him for acceptance, accept it, and that he will pay the same when it becomes payable, upon due presentment thereof for that purpose.” [Story on Bills, 121-2, 370.]

The liability of the indorser is not an absolute, but a conditional one. All the conditions before recited, enter into and constitute part of the contract between the parties ; and the law imposes the performance of them upon the holder, as conditions precedent to the liability of the indorser. [Story on Bills, 370-1 ; Musson, et al. v. Lake, 4 How. S. C. R. 262.]

The indorser stands in the light of surety for the acceptor. [3 Kent, 83, 111.] And fraud by the creditor, in relation to the obligation of the surety, will discharge the latter. [Burge on Suretyship, 218.] The suretyship of an indorser is different in its character and incidents, from that of one joint-maker of a promissory note, which he signs as surety for the other. [Smith's Mercantile Law, (Holcombe & Gholson's edition,) 269, 270.]—Where it is expressly held, that the loss of the bill, after it fell due, will not entitle the plaintiff to recover. [272.]

J. S. KENNEDY and J. A. NOOE, for the defendant in error made the following points :

1. The time from the death of the testator till the grant of letters, and the period of six months after the grant of letters, (during which no action can be brought,) must be deducted from the period relied on as a bar. [Clay's Dig. 192, § 2 ; 326, § 78 ; Hutchison, Ex'r v. Tolls, 2 Porter, 44 ; Hought v. Adm'r of Shields, 3 Ib. 247 ; Douglass v. Forrest, 4 Bing, 686 ; Webster v. Webster, 10 Ves. 73 ; Hansford v. Elliott, 9 Lee, 79 ; Hudson v. Hudson, 6 Munf. 352.]

2. The court did not err in refusing to dismiss for want of jurisdiction, on the ground that no affidavit of the loss of the first of exchange and protest thereof, was made before suit was instituted. The bill is not lost so as to come under the description of lost notes, &c. in Clay's Dig. 333, § 112; 382, § 9. Bills are commonly drawn and delivered to the payee, in several parts, called sets of the same bill, any one part of which set being paid, the others are void. [Story on Bills, § 226, 66; Bailey on Bills, ch. 1, § 8, 5 ed. 1830.] The drawer or indorser to be charged on *non-acceptance*, or *non-payment*, is entitled to call for the protest, and the identical bill, or number of the set protested, before he is bound to pay. And it would be sufficient to produce it at the trial, or account for its absence. [3 Kent's Com. 109; Powell v. Roach, 6 Esp. N. P. Rep. 76; Kenworthy v. Hopkins, 1 Johns. Ca. 107; Wells v. Whitehead, 15 Wend. 527.]

3. It was proper to read the second of exchange, prove the loss of the first, and protest after maturity, (accounting for its absence as above,) and prove notice to Hutchings. The fifth count is upon the second of exchange. There was no necessity to alledge the loss of the first of exchange, the set protested. Defendants below had only a right to call for it. And when it was called for, we were bound to account satisfactorily for its absence. [See authorities last cited.] The plaintiff does not seek to recover on the lost set, hence there is no necessity for a count on the part lost.

4. Defendants have no right, by admitting any one fact to deprive us of the right to make all legal and pertinent proof in our power. Testimony which is relevant, cannot be rejected because unaided by other proof, it will not make out the case. The effect of testimony can only be ascertained by a motion to instruct the jury. [Harrell v. Floyd and wife, 3 Ala. 16; Cuthbert v. Newell, 7 Ib. 457; Smith v. Armistead, Ib. 698.] But testimony tending to show that defendant's testator was *indemnified*, is pertinent and relevant to another point in this cause, than that of dispensing with protest and notice.

It has been held, "that if the payee or indorser of a note, or the drawer of a bill, had received money from the maker of a note, or the acceptor of the bill, for the express purpose

of paying it, he has in that case been considered liable to the extent of that money, to be sued for money had and received, although he had no notice of the dishonor." [Chitty on Bills, (ed. 1839,) 482.] "Although a drawer or indorser has been discharged from liability on the bill, in consequence of *laches* of the holder, he may nevertheless be liable in respect to funds that have been specifically advanced to pay the bill. [Ib. 489; Conroy v. Warren, 9 Johns. Cases, 258.] Defendant's testator, by becoming a party to the deed of trust, thereby released the acceptors. [Story on Bills, § 433; Bradford v. Hubbard, 8 Pick. 155.] Indemnity from the principal will bind the surety, though time be given to the principal. [Chilton & Price v. Robins, Paynter & Co. 7 Ala. 120.]

The following authorities show, that the defendant's testator, having "sufficient," or "ample indemnity," is not entitled to protest and notice: Stevenson v. Primrose, 8 Port. 155; Bond v. Farnum, 5 Mass. 173; Baily on Bills, 241; Chitty on Bills, (ed. *sup.*) 473; Story on Bills, § 433, 374; 3 Kent, 113; 12 Wend. 123; 11 Johns. R. 180; French's Ex'r v. Bank Columbia, 4 Cranch, 141. No demand necessary when the indorser is indemnified. [Mechanics Bank v. Griswold, 7 Wend. 165.]

If the acceptors had paid the bill at maturity, they (being accommodation acceptors) could have recovered the amount from Hutchings; he was bound to pay the bill, being indemnified, and having controlled the proceeds, and it matters not with him whether he pays the bank or the acceptors. [Story on Bills, 434, 425; Chitty on Bills, 450 to 454; Sargeant v. Appleton, 6 Mass. 85; Murray v. Judah, 6 Cow. 484; French's Ex'r, &c. *supra.*] If the bill in suit was not one of the bills described in the trust deed, it would have been competent for defendants to have shown the fact. Our proof that it was, is at least *prima facie*.

5. There was no error in permitting W. Pope, jr. the trustee, to identify the bill in suit with the one spoken of in the deed, although imperfectly described. [Duval's Heirs v. McLoskey, 1 Ala. 737; Locket v. Child, 11 Ala. 640.]

6. There was no error in permitting the quit claim deed of Hutchings to Pearson, to be read to the jury. [See authorities under 3.] We may add the general doctrine of *es-*

toppel—that Hutchings having by deed said that he was satisfactorily secured against his liabilities for Pearson in the trust deed to Pope as trustee, he nor his representative cannot gainsay it. This added to the proof that Hutchings ordered Camper's debt of \$3,000 to be paid, is conclusive to show that he was amply indemnified.

7. It was proper to permit Compton to prove that Abernathy (our own witness) was mistaken. [Phil. on Ev. Cow. & Hill's Notes, 309; Winston v. Mosely, 2 Stew. 137.]

8. Presentment of a mere abstract or brief statement of the nature of the claim is quite sufficient. [Bigger's adm'r v. Hutchings, 2 Stew. 445; Mardis's adm'r v. Shackelford, 4 Ala. 503; Acre v. Ross, 3 Stew. 288.] A written acknowledgment by an acting executor, that a claim was presented within the time required by law, is evidence of the fact of presentment. [Starke & Moore v. Keenan's ex'r, 5 Ala. 590.] The service of a *scire facias* upon the personal representative would be a presentation of the claim. [Jones's ex'r v. Lightfoot, 10 Ala. 18.] The commencement and continued prosecution of a suit within eighteen months from the grant, is a presentation of the claim against the estate of a deceased person, within the meaning of the act. [Henly's ex'r v. Shufford, 11 Ala. 203.]

9. We contend that the order on the minutes of the bank, stating that in the event Kirkman, Abernathy & Hanna, failed to pay the bill at maturity, their credit should not be affected in bank, did not prejudice the rights of the indorsers—1. Because the agreement was *nudum pactum* a promise by a creditor to give time in writing, and the time actually given to the principal, does not release the surety, if there was no consideration for the promise. [Agee v. Steele, 8 Ala. 948.] An express agreement not to sue, made after giving notice of non-payment, being *nudum pactum*, will not discharge the other parties. [Chitty on Bills, 447, and authorities there cited.] A gratuitous agreement by the holder of a bill with the acceptor, made on the last day of grace, to look to him alone for payment, and not to present the bill, or notify the drawer, does not relieve the drawer if the protest is made and notice given. [De Witt v. Bigelow, 11 Ala. 480.] 2. Because the bank entered into no agreement by which it was

disabled from bringing suit at any time the indorsers might require it. [Chitty on Bills, *ubi supra*; Inge v. Bank of Mobile, 8 Port. 108; Prout v. Decatur Bank, 6 Ala. 309; Shehan v. Hampton, 8 Ala. 942; Chilton & Price v. Robins, Paynter & Co. 4 Ala. 223.] The agreement, *nudum pactum*, as it was, did not encourage the acceptors not to pay the bill, nor did it give time. Must a creditor refuse to extend credit to a principal in order to avoid a release of a surety? 3. Because Hutchings, by becoming a party to the trust deed to Pope, has himself released the acceptors. [Story on Bills, § 433; Bradford v. Hubbard, 8 Pick. 155.] If this agreement could be tortured into a release of the acceptors, it could not affect Hutchings's rights, because, by taking ample security, he became the principal party to the bill, and it can make no difference with him whether he pays the bank or the acceptors: for if they had paid the bill, being accommodation acceptors, they could have recovered the amount from Hutchings or his representative. [Story on Bills, § 434, 425; Chitty on Bills, 450 to 454, 269; Sargent v. Appleton, 6 Mass. 85; Murray v. Judah, 6 Cow. 484.] Parties without funds in the hands of drawees, are not discharged, though time be given, or additional security taken. [Chitty on Bills, 450, side page, and note of Catlet v. Haigh, 3 Campbell, 281.] As to bank refusing to cancel on Pearson's check. "If a bill is negotiated for a particular and special purpose, then the proceeds cannot be applied to a different purpose." [Chitty on Bills, 91, side page, and note of Smith v. Knox.] This will apply to Hutchings's directions to Nelson as to the original design of the parties to the bill as to the application of its proceeds.

DARGAN, J.—The first question arises on the state of the pleadings.

The defendants pleaded the statute of limitations of six years. The plaintiff replied the death of the testator in January, 1841—the grant of letters testamentary to the defendants on the 25th January, 1841—and that deducting the six months after the grant of letters to the defendants, during which they could not be sued, the cause of action has not accrued within six years previous to the issuance of the writ.

To which replication there was a demurrer, and it was overruled. This brings up the question, whether the six months after the grant of letters testamentary, or of administration to the representatives of a decedent, shall be computed, in calculating the time necessary to the bar of six years. In the case of *Houpt v. Shields*, 3 Porter, 247, it was considered as a settled question, that the six months, during which the right to sue was suspended by statute, was not to be computed in calculating the time necessary to form the bar. This was considered as decided by the case of *Hutchison v. Tolls*, 2 Porter, 44; and the Supreme Court of Mississippi has so decided on a similar statute, in the case of *Dowell v. Wilcher*, 2 Smede & Marshall, 452. And these decisions seem to be in conformity with reason—that if the right of action is suspended by statute for a time, that this time should be deducted, in calculating the time necessary to form the bar.

2. The next question is, whether the debt or claim, was presented to the defendants as executors, within eighteen months. The evidence on this point is, that the bank made out a list of all claims against the defendant's testator; at the foot of which they were informed that the bank looked to them for payment, and the claim sued on was described in this notice, by its date, amount; and also the character that each party bore to the bill, stating that it was payable in New Orleans.

This was amply sufficient. It is not necessary to present to the executor, the piece of paper, on which the bill or note is written; nor would it be necessary to produce the witnesses who would prove the claim, if it could be proved orally by parol. All that is necessary, is to give him notice of the existence of the debt, and that the holder looks to the estate for payment. [See 10 Ala. Rep. 23; also, *Boggs, adm'r, v. The Branch Bank at Mobile*, 10 Ala. 970.] So it has been held, that suit brought on a claim within eighteen months, against the representative, is a sufficient presentation. [1 Porter, 359.]

3. The next question we propose to examine, is, as to the correctness of the refusal of the court to charge as requested by defendants.

After the bill was accepted, but before it fell due, the bank

by resolution agreed, that under the peculiar circumstances of this case, the credit of the acceptors should not be impaired in bank, by the protest of the bill for non-payment; and to carry out this agreement, the bill was not sent to the bank in New Orleans, with which they usually did business, but was sent to Martin, Pleasants & Co., who were advised of this agreement; but the defendant's testator had no notice of it. To rebut this proof, the plaintiff offered in evidence a deed executed by P. F. Pearson, for whose benefit the bill was drawn, accepted and endorsed, and to whose credit the proceeds was placed, dated the 17th October, 1838, by which he conveyed to Willis Pope, as trustee, all his stock of goods, accounts, &c., to secure the defendant's testator against all liabilities he had incurred on his account. This deed was signed by the trustee, Pope, and also by the defendant's testator; and by the terms thereof, the said Pope was required, in the first place, to pay all debts from the proceeds of the effects, for which Hutchings was liable, for and on account of the said Pearson; and the testimony of the trustee, Pope, shows, that it was ample to pay the debts of Pearson, on which the defendant's testator was liable; and that he had, under the directions of the testator, paid \$3,000, to other debts. Under this proof, the court refused to instruct the jury, that the agreement of the bank, before alluded to, discharged Hutchings as the indorser of the bill.

The contract of an indorser, is, that if the bill be presented, payment demanded, and it be refused, then, on protest for non-payment and notice, he will pay.

The demand of payment is a pre-requisite to his liability, (if it can be made,) and this pre-requisite must be complied with in good faith. An agreement made by a bank, with the acceptor of a bill, before its maturity, that if it be not paid, his credit shall not suffer, will, and should discharge an indorser. The credit of an acceptor, is the security that the indorser has for the payment of the bill. To preserve his credit unimpaired, is a matter of the highest importance to a merchant; he will, and ought to use all just efforts to protect it; but this credit is prostrated at once, if he does not meet his bills. An agreement, therefore, with an acceptor, to protect his credit, although he does not meet his bills, takes

from the indorser his highest security, that the acceptor will pay. This interference with the rights of an indorser, will discharge him from all liability on the bill.

But the question recurs, if the acceptance be made for the mere accommodation of the drawer, and the indorser has received indemnity from the drawer, to pay this bill, will such an agreement discharge the indorser? In the case of *Stephenson v. Primrose*, 8 Porter, 166, this court said, whenever an indorser receives collateral security, to protect him from his indorsement, and the security, whether it be by way of mortgage, or otherwise, is sufficient for that purpose, the maker's default will fix the liability of the indorser, without demand being made or notice given. So in the case of *Chilton v. Robbins, Painter & Co.*, it was decided, that a security, who was fully indemnified, could not avail himself of the defence that the creditor had given time to the debtor, without his consent, see 4 Ala. Rep. 223; to the same effect see 12 Wend. 123. And in the case of *Bradford v. Hubbard*, 8 Pick. 155, it was decided, that an indorser who had been fully indemnified, could not maintain an action against an accommodation acceptor.

These authorities show, that an indorser who is indemnified, cannot complain, though no demand be made of the acceptor. This proposition however, has been assailed in the argument of the plaintiff's counsel, and we are referred to the argument of chief justice Gibson, in the case of *Kramer v. Sanford*, 4 W. & Serg. Rep. 328. He expresses, it is true, strong dislike to the principle, that taking indemnity from the drawer, is a waiver of demand, and notice; but yet concedes, that if money, or effects, is placed in the hands of the indorser to pay the bill, and sufficient to protect him, that there is no necessity for giving him notice. By this admission, he yields the whole question, for the authorities referred to, hold the indorser liable only when he has received full indemnity. And if he has received full indemnity for the purpose of paying the bill, we cannot see what injustice there is in holding him liable to pay it; nor will any prejudice result to him, or injury to this species of securities, from such a principle. Whenever therefore, an indorser has received full indemnity to pay a bill, he stands as an acceptor, bound

to pay the bill, whether it has been presented for payment, or not.

But it is objected that the deed of trust does not specify this bill, and that it was erroneous to permit parol proof to show that this bill was intended to be secured, and was in fact secured, though by an improper description. This is not the law; the deed does not undertake to specify the debt with certainty, and the rule is well established, that if a mortgage is made to secure a debt, and the debt be improperly described in the mortgage deed, yet as between the parties to it, the actual debt may be shown, and the mortgage will be held as a security for it. [Duval's Heirs v. McLoskey, 1 Ala. Rep. 708.] The court therefore did not err in permitting the witness to testify, that this bill was secured by the deed of trust, nor was it error, under all the evidence, to refuse the charge requested, as the testimony tended to show, that the testator had ample indemnity.

4. The next, and last question we shall notice, is, was it necessary before the suit was brought, to make the affidavit, required by the statute of 1828? The proof on this point is, that the bill after protest, was remitted back to the bank, with the protest. It was drawn in sets, first and second. The first only was accepted, and protested, and the cashier of the bank, thinks it was handed to the attorneys of the bank, Rice & Lindsay, for suit; and it appears they gave their receipt for it; but they have no knowledge of it, nor are they able to state what has become of it—from this the cashier infers it was lost. Search has been made for it, at every place where it would be likely to be found. On this proof, the plaintiff proceeded to read the second of exchange, and to give secondary evidence of the protest of the first—the protest being lost with the first set. To the admission of this proof, the defendants objected, but the objection was overruled. The statute of 1828, (Clay's Dig. 382) is in the following language: "That when any person may have, or own, or may have had, or owned, any bond, bill, note, agreement, or other instrument in writing, the right, or title to the same, remaining in him, her or them, and the same shall be, or shall have been destroyed, by fire, or lost by accident, such person, or persons, shall be authorized, upon first making

oath in writing, of the loss of such bond, bill, note, agreement, or other instrument, and that the same has not been paid, satisfied, or otherwise discharged, to sue for, and recover the same, at common law."

This statute has received a construction, from which we cannot depart. In the case of the Bank of Mobile v. Tillman, it was decided at the last term, that this statute was cumulative merely; that a plaintiff, notwithstanding this statute, might sue at common law, without making the affidavit, in all cases where he could have sued at common law, before the statute; but if he would sue on any lost instrument at law, since the statute, upon which he could not sue at common law because of the loss, he must first make the affidavit prescribed. It is then necessary to ascertain, if the plaintiffs could have maintained their suit on the evidence, before the passage of this act. If they could, then by the construction given to this act, it may now be done.

It was for a long time an unsettled question in England, whether a suit at law could be maintained on a lost note, or bill, that could be passed from hand to hand by delivery, and on which any holder might sue. But in the case of *Hansard v. Robinson*, 7 B. & C. Rep. 20, Lord Tenterden, after a thorough examination of the question, determined against the right to sue at law, and from that time, the question seems to be settled in England, and the decision in this case has been adopted by the text writers as unexceptionable. [See *Chitty on Bills*, 297; *Story on Bills*, —.] And these authorities say, it is not material whether the bill was due, or not, at the time of the loss. The same question arose in 3 Cow. 303, and the same rule was maintained, and the court say, that a suit at law, cannot be maintained on a lost note, that is transferable by delivery, and that the only remedy is in equity, and that the rule is the same, whether it lost before, or after due.

Mr. Greenleaf, in his treatise on Evidence, vol. 2, 131, adopts the same rule. I have looked into the authorities, with some wish, to find the rule established to the contrary, but I think I am forced to pronounce, from the weight of authorities, both in England and the United States, that a suit cannot be maintained at law, on a lost bill, or note, that will

pass by delivery, whether lost before, or after due. The statute, then, not having been complied with, the suit cannot be maintained, for the want of the oath prescribed. The defendant's counsel, however, has attempted to draw a distinction in this case; he says that the whole bill has not been lost, but only the accepted, and protested part, or set; and that a suit at law can be maintained on the second set, or part which has not been accepted, or protested, on proof of the loss of the accepted part. I have examined the authorities referred to, and they do not bear out the distinction. In 1st Johnson's Cases, 107, although the court say, that the plaintiff was not bound to transmit the accepted set, but might retain it, to proceed against the acceptor, and at the same time proceed against the indorser. It will be seen, that the question arose merely on a question of notice, and the accepted set was remitted back, before the trial, and was produced. (The head note of that case is incorrect.) And in the case of Wells v. Whitehead, 15 Wend. 528, Nelson, J., reviewed the authorities on this question, and his conclusion is, that the acceptor can require the production of the accepted set, before a recovery can be had against him.

So it is said by Chitty on Bills, 175, 9th edition, that if the holder present an unaccepted part of a bill, and suggests that he has lost the accepted part, that the acceptor may require of him, caution, or security against his liability to pay the accepted part. From this it appears, that if the accepted part is lost, that an acceptor may demand security, before he is bound to pay. If the acceptor can demand security, before he is compelled by law to pay, that right of the acceptor is inconsistent with an immediate right of action on the part of the holder; for if the holder could sue at law immediately, without regard to this right of the acceptor, then would the acceptor be bound to pay, without caution, or security. We are therefore brought to the conclusion, that the court erred in admitting the secondary evidence of the bill, and protest, and the judgment is reversed, and the cause remanded. It may be, that the bill will be found, or the testimony may establish the destruction of the bill, in either of which events, the affidavit would be unnecessary.

GIBBS v. JEMISON, ADM'R.

1. G., purchased from A. a tract of land, knowing that the title was outstanding in another, executed his notes for the purchase money, and took from him a conveyance by deed. Afterwards, J., the assignee of the notes, executed a covenant to G., by which, in consideration that G. paid him \$4000 by the first Monday in April, 1841, he bound himself to procure, and deliver to G., a fee simple title to the land, at the time agreed on for the payment. J. immediately commenced proceedings to get in the outstanding title, but was unable to do so before 1846, previous to which he had coerced the payment of the money from G. by execution. An action being brought by G., against J., on the covenant, after the payment of the money, and before the title was obtained by J.—Held, that the measure of damages could not exceed the expense, and trouble of obtaining the legal title, and when that was obtained and vested in the plaintiff before the trial of the cause, the damages should have been merely nominal.

Error to the Circuit Court of Sumter.

COVENANT by the plaintiff in error. From a bill of exceptions taken at the trial, it appears, that the plaintiff purchased a tract of land of one Henry F. Arrington, sen. who informed him at the time, that he had not a legal title to the land, and offered to execute to him a bond for title, which the plaintiff declined, saying he preferred a deed. At this time Arrington was solvent, but afterwards, and before the purchase money became due, was insolvent. The defendant's testator became possessed of the notes given for the purchase of the land, and urged payment, which the plaintiff declined, because of the outstanding title and the insolvency of Arrington. That therefore, in consideration that Gibbs would confess a judgment on the note, with a stay of execution until the first Monday in April, 1841, and then pay it, the defendant's testator executed and delivered the following covenant:

Know all men by these presents, that I, John S. Jemison,

Gibbs v. Jemison, Adm'r.

for and in consideration of \$4,005, to me to be paid, by the first Monday in April, 1841, by Charles R. Gibbs, do bind myself, my heirs, &c. to the said Charles R. Gibbs, his heirs, &c., to procure and deliver to the said Charles R. Gibbs, his heirs, &c., by the first Monday of April, 1841, a title in fee simple to the said Charles R. Gibbs, to the following tracts and parcels of land. (Here follows a description of the land.) In witness whereof, &c., &c., this 13th April, 1840.

That immediately after the execution of this covenant, defendant's testator caused a bill to be filed in the name of Henry F. Arrington, against William Jemison, sen., to get in the outstanding title, and prosecuted the suit diligently but was unable to obtain a decree until 1846, at which time a decree was made divesting the title out of Jemison, and vesting it in Arrington. That previous to this time, defendant's testator had coerced the payment of the money by execution, and both before and after the payment, plaintiff urged defendant's testator to prosecute the suit and obtain the title.

The court charged the jury, that the measure of damages was not the value of the land at the time of the default, but that it was the actual injury the plaintiff had sustained by the delay in perfecting his title. To this the plaintiff excepted, and now assigns for error.

REAVIS, for plaintiff in error.

R. H. SMITH, contra.

ORMOND, J.—This is not a covenant between vendor and vendee, but is a covenant by a stranger, that in consideration of the payment, by the vendee to him, of a sum of money by a stipulated period, he will at that time procure to be made to him a title in fee simple to a tract of land. It is quite clear that these are dependent covenants, and that neither can maintain an action against the other, without averring a performance on his part. The declaration avers that the plaintiff did pay the money at the time stipulated, but that the defendant did not cause the title to be made.

In *Pinkston v. Huie*, 9 Ala. 252, we held, that the measure of damages, upon a breach of covenant, that a third per-

son would make a title, was not the price, or value of the land, but the value of the title at the time it was to have been made. To the same effect is *Dyer v. Dorsey*, 1 Gill & J. 440. So in this case, if the plaintiff had proved a performance of the contract on his part, the measure of damages at law, would have been the value of the outstanding legal title in William Jemison, sen. We say at law, because in equity, it would have been held, that time was not of the essence of this contract. This was held in *Beck v. Simmons & Kornegay*, 7 Ala. R. 71, which cannot be distinguished from this. There, as here, it was known at the time the contract was made, that a suit was necessary to get in the outstanding title, and if the covenantor proceeds with diligence to obtain it, and is prevented by the necessary delays of the law from obtaining it, by the time stipulated, he will not in a court of chancery, be held to a literal compliance with it.

Here the plaintiff did not comply with the contract on his part, so as to entitle him to demand a strict performance from the defendant, and the charge of the court, that he could recover for any injury caused by the delay, was as favorable as he could have asked.

It appears, that by the purchase and deed from Arrington, he obtained a perfect equitable title to the land, the naked legal title being outstanding in another. In such a case it would seem, the measure of damages could not exceed the expense and trouble of obtaining the legal title, and when, as in this case, the legal title had been obtained, and vested in the plaintiff before the trial of the cause, the damages should have been merely nominal.

Judgment affirmed.

McCURRY v. HOOPER.

1. An inquisition, had by order of the orphans' court, to ascertain whether an individual is not *non compos mentis*, of the pendency of which he has no notice, is not evidence for any purpose, to affect the right of the individual so found to be insane, or any one claiming through him.
2. Insanity, is shown by the proof of acts, declarations, and conduct, inconsistent with the character, and previous habits of the party. The mere opinions of witnesses, of the sanity, or insanity, of a person, are not competent testimony, unless they are medical men, acquainted with the facts.
3. The defendant in the action of detinue, may show title in a third person.
4. The proper practice, is, to reject illegal testimony when offered, and not to admit it, subject afterwards to be excluded, when the court charges the jury ; as it may be impossible to eradicate an improper impression made upon them. An exception to this rule obtains, where a party proposes to make testimony relevant, by evidence to be subsequently offered.

Error to the Circuit Court of Talladega.

THIS was an action of detinue, brought by the plaintiff, to recover of defendant, certain slaves. On the trial, the plaintiff read in evidence a bill of sale, executed to him for the slaves, by George L. Patrick, bearing date the 9th January, 1845. At the date of the instrument, the slaves were in possession of Patrick, and belonged to him. The consideration expressed in the bill of sale, is \$1,200.

The defence was, that at the date of the execution of the instrument, Patrick was *non compos mentis* ; and to show this, the defendant offered in evidence the transcript of a record from the orphans' court of St. Clair, from which it appears, that on the first day of January, application was made to the judge of the orphans' court, by the friends of George L. Patrick, for an inquisition of lunacy, to ascertain if said Patrick was not a lunatic, and incapable of managing his affairs ; but it does not appear who those friends were. The judge of the orphans' court ordered a writ *de lunatico inquirendo*, to be issued to the sheriff of the county, command-

ing him to summon twelve citizens of the county, to make inquisition, if said Patrick be a lunatic, and incapable of managing his affairs. The sheriff summoned the jury, and on the 4th day of January, 1845, after being sworn, they found that Patrick was incapable of transacting his business, and was liable to be imposed on by any designing person, and certified this verdict, under their hands and seals. The sheriff returned the writ, with this verdict of the jury, to the orphans' court,

On the 6th day of January, 1846, the orphans' court appointed the defendant guardian of the person, and property of George L. Patrick—after reciting what the jury had done, and stating that they had certified that Patrick was incapable of transacting business, and was *non compos mentis*. The defendant gave bond with security, and letters of guardianship were issued to him. The defendant proved, that he obtained possession of the slaves under these proceedings in the orphans' court, and also introduced proof tending to show, that the object of the bill of sale, was to enable the plaintiff to run off the slaves, and to sell them for a compensation.

To the admission of each portion of this testimony, and to the whole of it, the plaintiff objected, but the court permitted it to go, reserving the admissibility of it, and its legal effect, until his charge to the jury should be given by consent of parties.

The defendant offered evidence tending to show, that the plaintiff had but very little property, and was indebted about \$250. To the admission of this evidence the plaintiff objected. The only evidence of any consideration paid by plaintiff, was, that he had given his note to Patrick for \$1,200; but there was a conflict of testimony whether he had or not.

The defendant also proved by witnesses, who were not physicians, that there had been, for about two years, a change in the appearance of Patrick. That he was about seventy-five years old; that his eyes once had a natural appearance, but that now they had not. To this evidence the plaintiff objected, but his objection was overruled, and the plaintiff excepted.

The defendant also proved, that for some time previous to

the execution of the bill of sale, Patrick frequently cursed his son, said he cared nothing for the bible, and that he was as good as Christ. To this evidence the plaintiff objected, but his objection was overruled.

The plaintiff offered to prove by the subscribing witnesses to the bill of sale, that in their opinion, Patrick was sane at the time he executed it. The defendant objected to this proof; the objection was sustained, and the plaintiff excepted.

The court charged the jury, 1. That if they believed that the bill of sale was executed, merely to enable the plaintiff to run off, and sell the slaves for compensation, the plaintiff could not recover.

2. That although the proceedings in the orphans' court were not evidence of the insanity of Patrick, yet they were evidence of an outstanding title in the administrator of said Patrick, and if they believed said Patrick was insane at the time of executing the bill of sale, the plaintiff could not recover. To these charges, and to the refusal of the court to exclude from the jury, the proceedings of the orphans' court, the plaintiff excepted.

S. F. RICE, for the plaintiff in error.—The proceedings of the orphans' court were wholly void, because George L. Patrick had no notice of them. [5 Pickering, 217; 14 Mass. 222.]

The court erred in permitting the defendant to show the pecuniary condition of the plaintiff, to impeach the bill of sale.

The court should have permitted the subscribing witnesses to testify as to their opinion of the sanity of the testator.

The charges of the court were erroneous.

WOODWARD, contra.—There was no error in the ruling of the court.

The record of the orphans' court was competent evidence to enable the defendant to prove by other evidence, the insanity of the maker of the bill of sale.

The defendant could prove title in another, to show the

plaintiff had no title. [8 Porter, 314 ; 9 Ib. 151 ; 15 Johns. 207 ; 14 Ib. 128.] All the evidence tended to show that Patrick was insane.

The opinion of the subscribing witness, as to the sanity of Patrick, was properly rejected. [5 Ala. 241.]

DARGAN, J.—The first question we propose to examine, is, was the record of the orphans' court of St. Clair, purporting to be an inquisition of lunacy, to ascertain if George L. Patrick was sane, or *non compos mentis*, evidence for any purpose ?

These proceedings purport to be had on the application of the friends of Patrick. The writ was issued, and the jury certified that he was incapable to transact business ; that he was liable to be imposed upon by designing persons ; and that he was *non compos mentis*. This verdict was returned with the writ, and thereupon, a guardian was appointed, the defendant in error, to take charge of his property and person. It does not appear that George L. Patrick had any notice whatever, of the time, and place, of making this inquisition ; or that the jury saw him, or made any application, or effort to see him. It does not appear that he had any notice of the application to the court for the writ, or that he had any notice of the action of the court, on the return of the writ—but the proceedings were *ex parte* merely ; and by the judgment of the orphans' court, the defendant in error is invested with the control of the property, and person of Patrick.

I think it is a fundamental principle of justice, essential to the rights of every man, that he shall have notice of any judicial proceeding that is about to be had, for the purpose of divesting him of his property, or the control of it, that he may appear and show to them, who sit in judgment on his rights, that he has not lost them by the commission of a crime ; nor should those rights be taken from him by reason of any misfortune. That he has the right to appear before the jury, and the court, and to show that he is not insane, that he, and his property should not be put in charge of another is a self-evident truth, and is denied by no legal authority. [See 12 Ves. 444 ; *Ex parte* Cranmer, Stock on Lunacy, 100.] This being his right, to appear, and defend himself, the ques-

tion is, what effect is the law to give to a proceeding that has denied this right ?

In the case of *Wait v. Maxwell*, 5 Pickering, 219, this precise question came up, and the court held, that the proceeding of the court of probate, and the grant of letters of guardianship, were null and void, because the *non compos* had no notice of them. And in 14 Mass. R. 222, it was determined, that it was the right of an individual, against whom proceedings in the court of probate were taken, to appear and controvert the fact of insanity, and that an inquisition taken without notice, was void.

These authorities seem to be, in unison with the first principles of justice, and are not opposed by any authorities that have fallen under our observation. We therefore come to the conclusion, that the proceedings of the county court, in the nature of an inquisition, and determining said Patrick to be *non compos mentis*, are void ; that they are not evidence for any purpose in the trial of the issues in this case, and should have been rejected, and not allowed to go to the jury.

This cause must be reversed for this error, and we will therefore lay down the rules of law, applicable to the evidence shown in the bill of exceptions, instead of examining each question separately.

It is clearly the law, that in an action of detinue, the plaintiff must show title in himself, and an unlawful detainer by the defendant, consequently, if the bill of sale was obtained by fraud, or imposition, the plaintiff cannot recover ; nor can he recover, if Patrick was insane at the time of its execution, for in either event it would not give the plaintiff a title, and the defendant could show that the title to the slaves was still in Patrick, or if he be dead, in his representatives. [See 8 Porter, 314 ; 14 John. Rep. 128 ; 15 Ib. 207 ; 11 Wendell, 58.]

When it becomes necessary to prove an individual insane, the usual evidence is, his acts, declarations, and conduct, inconsistent with his previous character, and habits, and leading to the conclusion of an aberration of the mind. The jury are to draw their conclusion from those acts, declarations, and conduct, whether the party is sane or not ; but the mere opin-

ion of the witnesses, whether the individual is sane, or insane, is not evidence. [5 Ala. Rep. 243.]

True, if the witnesses were medical men, acquainted with all the facts, they are permitted to give their opinion; but the law limits the rule to medical men. [Stock on Lunacy, 43; 2 Phil. Ev. 759, note 290.]

A subscribing witness to a will, is permitted to give his opinion, as to the sanity, or insanity, of the testator, but this is an exception to the rule, established rather on authority, than on any reason—and seems to be too well established to be departed from; but this is the only exception to the rule. That on the question of sanity, the witnesses must speak to facts, declarations, acts, and conduct of the party, conducing to prove insanity, and are not permitted to give their opinion, merely, that the party is sane, or insane.

Before we dismiss his case, we will express our opinion of the practice that seems to be growing up, of permitting the whole evidence to go to the jury, and then for the judge, either in his charge, or before his final charge is given, to exclude, or take back from the jury, such portions of the evidence as is illegal. After he has informed the jury, that the testimony of a particular witness, or some parts of it, is illegal, or that what they have heard read from a particular paper, or some part of it is illegal, is he able to say, that he has obliterated from the mind of each juror the effect or impression produced? May not the juror be unconsciously influenced by such impression, to some extent?

The better practice, is, to pursue the well established rules, and when evidence is offered, and objected to, the court should then exclude it, or permit it to go to the jury.

It is true, that a departure from this rule is frequently necessary, upon a question of the relevancy of the testimony. But then it is usual for the party offering it, to state to the court, that he intends proving some other fact, specifying what that fact is, which will connect it, and make the proof relevant. If he fail to do this—that is, to prove the connecting fact—the court should then reject the irrelevant proof. By this course of practice, we know that no impression is made on the mind of the jury by illegal evidence; but under the practice adverted to, we do not, and in cases of doubt,

this impression made by illegal proof, may determine the verdict, and if so, an injury will result, that may not be remedied.

Let the judgment be reversed, and the cause remanded.

GRAHAM AND ABERCROMBIE v. CHANDLER.

1. An execution issuing from the orphans' court, for the collection of money, should be made returnable to the regular *semi-annual* term of the county court proper, if there are fifteen days between the commencement of the term, and the teste of the writ; if not, then to the next succeeding term of the county court.
2. Such an execution, when issued, has the same attributes as an execution issued on a judgment at common law, must be executed in the same mode, and may be enforced in the same manner; consequently, a motion may be made against the sheriff for failing to make the money.

Error to the Circuit Court of Perry.

MOTION for judgment by the plaintiffs in error, against the defendant, sheriff of Perry, upon a suggestion that by due diligence he could have made the money on an execution which issued in their favor, upon a decree of the orphans' court of Perry, which was made returnable to the next stated term of the county court. The motion was originally made in the county court of Perry, and transferred to the circuit court, the judge of the county court being interested. On motion of the defendant's counsel, the court refused to take jurisdiction, and dismissed the cause, which is the matter now assigned for error.

PECK, for plaintiff in error.

A. B. MOORE, contra.

ORMOND, J.—In *Westmoreland v. Hall*, 11 Ala. R. 127, we held, that a motion for failing to return an execution, issued by the orphans' court, which was made returnable on a

day appointed by the orphans' court for the return of process, would not lie against the sheriff, and it is said, that "if the party in whose favor a decree of the orphans' court is rendered, would avail himself of the summary remedy against sheriffs, he should cause his execution to be returned to a *stated term* of the county court."

That has been done in this case, the execution having been made returnable to the term of the county court proper. a very brief review of the statute on this subject, will show the correctness of this course.

The present system was established in 1821, by which a single judge was appointed to perform the functions of judge of the probate court, and orphans' courts, and also to hold two terms in each year, at periods designated by law, for the transaction of business as a court of common law. He was required, "by order made in open court, to appoint certain days, not less than *one, in every period of each month*, for the return of process in such cases, as he is competent to hear and determine, in vacation." It is evident, that the *process* here spoken of, does not mean executions. On its face it imports such process as was necessary to enable it to perform those duties which it was required to perform in vacation. That the legislature did not include executions, in the term process, is placed beyond doubt, or controversy, by the fact, that it was not until nine years after the act was passed, that the orphans' court had power to issue executions.

This act, passed in 1830, gives to decrees on final settlements against executors, &c., the force and effect of judgments at law, and authorizes executions to issue thereon; but the act is silent as to the term of the court, to which the execution shall be returned. [Clay's Dig. 304, § 42.] It would seem however, necessarily to follow, that when this power was conferred on the orphans' court, the process was to be subject to the same rules by which the same process was governed, when issued by other courts of record.

The act of 1807, is the general law, regulating the manner of issuing and returning executions. They are to be made returnable to the next succeeding term, which by a subsequent act is changed, to three days preceding the first day of the next succeeding term: and at least fifteen days is

required to intervene, between the teste and return of the writ. To this act there is a proviso, "that if the plaintiff shall desire an execution to issue, the execution returnable at a further day, the clerk shall issue the same accordingly, so as the day of such return, be upon a court day, within ninety days after the teste thereof." [Clay's Dig. 199.] This act passed under the review of this court, in *Harrell v. Martin, Pleasants & Co.*, 4 Ala. Rep. 650. It was there held, that the term *court day*, in the proviso, was without meaning; the act having been copied literally from an old statute of Virginia, in which State there are monthly terms of the county court, held throughout the year, called *court days*. The true construction of the act was held to be, that the execution must be made returnable to the next succeeding term of the court, if there were fifteen days between the teste and return; but if there were less than that number of days, between the teste and return of the writ, then it must be made returnable to the next succeeding term. As therefore, fifteen days must elapse, between the teste and return of the execution, and if a levy is made, at least ten days notice must be given of the sale, not to speak of the other delays which the law allows, by giving a forthcoming bond, &c., it is obviously impossible, for an execution from the orphans' court to be made returnable, to the day which the court is required to designate for the return of such process, as it may hear and determine in vacation. These days, or terms, if they can be so called, must occur at least once in every month, and may, and in most of the counties of the State do, occur much oftener—twice, three times, or even four times in each month. From this it must result necessarily, that the execution, when issued, should be made returnable to the regular *semi-annual* term of the county court proper, if there are fifteen days between the commencement of the term and the teste of the writ; if not, then to the next succeeding term of the county court. This is the correct construction of the statute, or the act of 1830 is inoperative, and no execution can issue on decrees of the orphans' court: and this is in effect the result of the decision in *Westmoreland v. Hall*, *supra*.

The act permitting such a motion as this to be made

against defaulting sheriffs, passed in 1826, four years previous to the law authorizing the orphans' court to issue execution on its decrees, but it appears to us, there can be no doubt it operated upon the act of 1830, as soon as it was passed. It is a remedy given for the enforcement of executions, issued by a court of record, and whenever the power to issue execution is given to a court of record, all the laws applicable to the issue, return, and mode of enforcing the process, must immediately attach to it, unless other modes are pointed out in the act itself. Such was evidently the design of the legislature, as the act declares, that the decree of the orphans' court, shall have the force and effect of *judgments at law*. When therefore an execution issues on a decree of the orphans' court, it has the same attributes as an execution upon a judgment at common law—must be executed in the same mode, and may be enforced in the same manner.

This motion was transferred to the circuit court, because, as stated on the record, the judge of the orphans' court was related by consanguinity, to one of the plaintiffs. This was expressly authorized, and indeed required by the act of 1831. [Clay's Dig. 298, § 10.]

The court having erred in refusing to take jurisdiction of the cause, its judgment must be reversed, and the cause remanded.

PRINCE v. PUCKETT, Ex'x.

1. The plea of accord and satisfaction, is not an admission of the cause of action, when the general issue is also pleaded.
2. One who receives goods as a warehouseman, from one who obtained them by the commission of a trespass, and on demand, refuses to deliver them to the owner, is not liable to be sued in trespass. Trover, or detinue, is the appropriate action.

Writ of Error to the County Court of Sumter.

BALDWIN, for the plaintiff in error, made the following points :

1. The defendant below had the right to plead the general issue, and also special pleas in bar. The court charged that the plea of accord, and satisfaction, admitted the cause of action ; the general issue being pleaded, denied that right.

2. Under the evidence, trespass would not lie against the defendants. He cited 5 Cow. Rep. 489 ; 9 Bacon's Ab. 475, and other authorities.

REAVIS, contra.

DARGAN, J.—The sheriff of Sumter county, having an attachment in his hands against Kirkland, levied it on eleven bales of cotton, the property of James Puckett, and delivered the cotton to the plaintiffs in error, who are warehouse keepers. Puckett demanded the cotton of the plaintiffs, and they refusing to deliver it, he brought trespass against them to the county court. James Puckett died, and the defendant in error, his executrix, was made a party to the suit. The plaintiffs in error, pleaded not guilty, accord and satisfaction, with other special pleas. On the trial, the court was requested to charge the jury, that if they believed the defendants were not liable to the action of trespass, up to the demand as indicated by the testimony, then the demand, and refusal, did not make them liable to this action ; which the court refused, and charged, that the plea of accord and satisfaction, admitted the cause of action. The charge given, and the refusal to charge as requested, are assigned for error.

It is very clear, that the court erred in the charge given. By our statute, defendants may plead the general issue, and such special pleas in bar, as they may think necessary to their defence. To hold that a plea in bar, admits the cause of action, notwithstanding the general issue is pleaded, and relieves the plaintiff from the necessity of proving it, would deny the right to plead the general issue, with a special plea in bar. [7 Ala. Rep. 531.]

2. The court also erred in refusing to give the charge requested. It was asked rather awkwardly, but the substance, and meaning of it is, that under the evidence, the demand, and refusal, did not make the defendants liable to this action. This charge ought to have been given, for the law is, if a sheriff levy on the goods of A, to satisfy process in his hands against B, and deliver the goods for safe keeping, or sell them to a third person, such third person is not made a trespasser, although he refuse to deliver them to B, on demand; because the goods have come to his hands without fault on his part, and the owner must bring trover, or detinue. [2 Rawle's Ab. 556; 2 Saund. Plead. & Ev. 864; 9 Bac. Ab. 495.] Whether the plaintiffs in error, would be liable to trespass, had they obtained the cotton from the sheriff tortiously, we do not determine; but under the evidence, they were not liable to this action. The judgment is therefore reversed, and remanded.

HUNTINGTON, USE, &c. v. ADAMS.

1. H. sold P. two slaves, and received in payment a sum of money in cash, and the bond of P. for \$400, and promised P. that this bond should not be applied in any other way, than to the extinguishment of a mortgage, which one B. held on the slaves. Held, that this testimony did not contradict the bond, the written evidence of the contract—Nor was it irrelevant, as the question between the plaintiff, and defendant, was whether the latter assented to the delivery of the bond, by H. to the former.

Error to the Circuit Court of Greene.

THE facts of the case appear sufficiently in the opinion
See the case previously reported 9 Ala. 228.

W. P. WEBB for plaintiff in error.

J. B. CLARKE, contra.

ORMOND, J.—This case has previously been before this court, and will be found reported 9 Ala. 228. The question now presented, is not the same as at the last term.

The facts are, that Huntington sold Pippin two slaves for \$1400, and received for them \$1000 in cash, and his bond for \$400. At the time of the sale, there were two mortgages on the slaves, one in favor of one Booth, and the latter in favor of Adams, for whose use the suit is brought—the mortgage of Booth being the eldest, but the slaves at the time, being in the possession of Adams. At the time the contract was made Huntington promised Pippin, to satisfy both mortgages, and that he would not dispose of the bond unless he did so to Booth, and that the bond was not to be applied in any other way, than to the payment of Booth. This contract was by parol only; and the first question reserved on the record, is, whether this testimony was competent.

It is resisted on the ground that it is a violation of the rule of law, forbidding a written contract to be explained, by parol testimony.

We are not able to perceive that it has this effect. The written contract shows, that Pippin owes Huntington, a sum of money. The contemporaneous parol contract, that Huntington would not dispose of it, except to Booth, who held the oldest mortgage. This certainly has no tendency to contradict the bond, but admits it, and establishes the disposition Huntington promised to make of it.

Nor is the testimony irrelevant. When the case was here at a previous term, we held, that if Pippin was privy to, and assented to the arrangement between Huntington, and Adams, by which the latter delivered the slaves to the former, on receiving Pippin's bond, he would be precluded from setting up any defence against it, otherwise he would not be precluded. This then was made the turning point of the case, and the evidence of what took place between Huntington and Pippin, was not only relevant, but if believed by the jury was quite conclusive to establish, that Pippin neither knew, or assented to the delivery of the bond to Adams.

The court correctly refused to instruct the jury, that the facts in evidence warranted the inference, that Huntington, in delivering the bond to Adams, and obtaining the slaves

from him, acted as the agent of Pippin. Doubtless the understanding of the parties, was, that Huntington was to discharge the mortgage of Adams. This necessarily follows, from the sale of the slaves by Huntington to Pippin; but certainly in perfecting a title which he had sold, he cannot be considered as the agent of the vendee. At least no such inference can be drawn from the fact, merely, that he was to get possession of the slaves, by extinguishing the incumbrance.

We can perceive no error in the record. Judgment affirmed.

FLORA v. MENNICÉ.

1. An administrator *ad colligendum*, is the mere agent, or officer of the court, and may be removed at any time, and an administrator in chief appointed.
2. A judgment of the orphans' court, dismissing a petition for the removal of an administrator, and the appointment of the petitioner in his stead, cannot be reviewed by an appellate court, unless the evidence offered to the court, or the right of the petitioner to the administration, be shown upon the record.

Writ of Error to the Orphans' Court of Sumter.

THE record presents the following statement of facts. The plaintiff in error was appointed by the orphans' court of Sumter county, administrator *ad colligendum*, of the goods that were of Nancy Flora, who in life was the plaintiff in error. It then shows, that citations, from time to time, were issued to him, requiring him to file an inventory of the estate, but were not served on him. At the April term of the orphans' court, these letters were revoked, and the defendant in error was appointed administrator in chief, of the estate of the decedent; after this, the plaintiff in error presented his petition, praying that he might be re-instated in the office of adminis-

trator *ad colligendum*, and the revocation of the letters granted to the defendant.

At the October term, 1847, of said court, the following entry is made: "John A. Mennice, administrator of said estate, having been cited to appear at this term, and show cause why Benj. Flora, former administrator might not be reinstated, and having appeared after a hearing, the petitioner being present by his attorney, it is ordered, and adjudged, that said Mennice, be continued, and the petition be dismissed, at the cost of the petitioner, for which execution may issue—and the papers ordered to be filed, and recorded, except the answer of Mennice, which is excluded from the record, not being filed in time.

HOIT, for the plaintiff in error.

REAVIS, contra.

DARGAN, J.—There is nothing whatever in the record, to show that the court erred in dismissing the petition. The petitioner had been appointed administrator *ad colligendum*, but the court could at any time appoint an administrator in chief, notwithstanding this grant of letters *ad colligendum*. An administrator *ad colligendum* is the mere agent, or officer of the court, to collect and preserve the goods of the deceased, until some one is clothed with authority to administer them; and as such, cannot complain that another is appointed administrator in chief.

If the plaintiff in error was entitled to the administration in law, and if he was entitled to have the letters to Mennice revoked, it was necessary for him to show his right by proper evidence to the orphans' court; and if the facts were shown, and the court in its judgment had erred, in order to revise that error, the testimony or facts presented to the court below, should have been made part of the record, by bill of exceptions; and then the judgment of the court pronounced on these facts, would have enabled this court to determine, whether there was error or not. But merely presenting a pe-

tition to the court, and the recital that on the hearing the petition is dismissed, without showing what evidence was introduced, is not the ground of any error.

The judgment of the orphans' court, dismissing the petition is therefore affirmed.

BALDWIN v. LEFTWICH.

1. The *lien* of an attaching creditor, on land, is superior to the title of a purchaser under a subsequent judgment with notice of the levy of the prior attachment.

Writ of Error to the Circuit Court of Sumter.

EJECMENT, to recover a lot in the town of Gainesville.

BLISS and BALDWIN, for plaintiff in error.

R. H. SMITH, contra.

ORMOND, J.—The question presented on the record, relates to the character of the *lien* created by the levy of an attachment upon land. The facts are, that after the levy of the attachment, and before judgment obtained in the attachment suit, the same land was levied on by virtue of an execution upon a judgment, obtained subsequent to the levy of the attachment, and sold, the purchaser having notice of the levy of the attachment. He now brings ejectment, to recover the lands, and the question is, who has the superior title.

The authority principally relied on, to sustain the decision of the court, that the purchaser at the sale made after the levy of the attachment, had the superior title, is the decision of this court, in *Campbell v. Spence*, 4 Ala. Rep. 543. It is not contended that the decision there made, is expressly in

point, but that the policy of that decision can only be carried out, by holding that the actual *lien* of a judgment, when enforced, will override and extinguish, an imperfect or inchoate *lien*, though prior in point of time. The extent of that decision is, that a *bona fide* purchaser, at sheriff's sale, under a junior judgment, would hold the land against the *lien* created in favor of an elder judgment. But we cannot perceive how this rule can apply in such a case as the present. The foundation of the rule, in the case cited, is the laches of the elder judgment creditor; but no laches can be imputed in such a case as the present, as there was no authority to sell the land existing in the attachment creditor, until he had perfected his *lien*, by obtaining his judgment.

It is to be observed, that this is not a contest for the purchase money, between rival judgment creditors, but is a contest for the land itself, and if effect is not given to the prior attachment lien, it accomplishes nothing; and a *lien* expressly created by law, would be lost, without any act done by the party in whose favor it was created, or without lying under the imputation of laches, or neglect, from which a waiver, or abandonment of the *lien* could be inferred, in favor of an innocent purchaser.

The precise point here involved, has been decided by the supreme court of Mississippi, in *Redus v. Wofford*, 4 S. & Marshal, 479, where it was decided, that the *lien* created by the attachment, was superior to that of a purchaser under a subsequent judgment.

But can one, who purchases with notice of the existing *lien* of the attachment, be considered a *bona fide* purchaser? Whatever might be the decision, if this feature were not in the case, a point not necessary now to be decided, we are of the opinion, that as the purchaser under the junior judgment had notice of the prior attachment *lien*, he must be considered as having purchased in subordination to it.

Judgment reversed and cause remanded.

THE STATE v. JOHNSON.

1. If an officer having a *feri facias*, attempts to levy it on articles exempt by law from levy, and sale by execution, after being warned of the fact, the owner may employ as much force, as is necessary to prevent the levy; but if he employs more force than is necessary, he becomes a trespasser.
2. Two indictments, one for resisting legal process, and the other for an assault, cannot be supported for the same offence. The decisive test, is, whether the same testimony will support both charges.

Novel, and difficult questions, from the circuit court of Macon.

THE defendant was indicted for an assault upon a constable, and pleaded not guilty. Upon the trial, it appeared in evidence, that the constable went to defendant's house, to levy an execution, and attempted to levy it on a mare in his possession. The defendant told the officer the mare was the only work animal he had, and that she was not subject to levy. The constable proceeded to make the levy, but was prevented by defendant, who presented, and snapped a gun at him twice, at the distance of fifteen or twenty yards. The defendant's counsel thereupon moved the court to charge the jury, that if the defendant had no property but what was exempt from levy by execution, he had the right to defend it with any force necessary to prevent the levy, which charge the court refused to give, and charged, that in such a case he had no right to resist the officer, but must seek the peaceable redress the law gave him. The jury found a verdict of guilty, and assessed a fine of \$30, and judgment was rendered, but execution delayed until the next term.

The defendant was also indicted for resisting legal process, and upon the trial it appeared, that the evidence was the same in every particular as in the preceding case, and that it was the same transaction. The defendant was found guilty, and fined \$50, and judgment accordingly, but the execution

suspended until the next term, referring to this court the following questions: First, whether one who has no property except that which is exempt from execution, has the right to resist an officer, who attempts to levy an execution upon it, finding it in his possession, and to what extent can such resistance be lawfully carried. Second, can the defendant be indicted, and punished for two offences separately, when the transaction out of which they grew is identical.

DOUGHERTY, for defendant in error.

ATTORNEY GENERAL, contra.

ORMOND, J.—The delivery of a writ of attachment, or *fi. facias* to an officer, is a command to levy it on the property of the defendant; if he levies it on the property of a stranger, he is a trespasser. We do not think there is in law, or in reason, any substantial distinction, between the levy of an execution on the property of a stranger, or the levy upon articles exempt by law from levy and sale, after the sheriff has been warned of the fact, that they are exempt. Our first impression was, that there was a distinction, from the fact, that these exempt articles were always in the possession of the defendant, and that the sheriff had no means of knowing, whether the property was entitled to exemption, or not. But it was the intention of the legislature, that these articles of prime necessity for the comfort of the family, should be kept inviolate for its use, and it would in a great measure defeat the object of the law, if the defendant was required to submit to such a levy, and seek redress against the officer by action.

The apology pressed on the court, by the attorney-general, of a writ commanding the sheriff to arrest one privileged from arrest, when it is held the sheriff must notwithstanding make the arrest, and that although the privilege is claimed, is more specious than solid. The writ in such a case is specific; it directs on whom it shall be executed, and the officer has no power to disobey its mandate. When the writ is general, as when a *fi. fa.* is issued, the command is no further specific, than it limits the taking

to the property of the defendant, and of this the officer must, at his peril, take notice.

It is a settled principle of our law, that every one has the right to defend his person, and property, against unlawful violence, and may employ as much force as is necessary to prevent its invasion. [Ackworth v. Kemp, 1 Douglass, 40; Commonwealth v. Kennard, 8 Pick. 133.] If however the defendant employed more force than was necessary to prevent the seizure of the property, he became a trespasser.

It is also very clear, that the defendant can only be held responsible, if guilty, upon one of these indictments. The decisive test, is, that the same testimony will support both charges.

Judgment reversed and remanded.

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ABATEMENT.

1. A plea in abatement to an attachment, because it was issued without affidavit, and because the writ, though properly addressed, commands the plaintiff *eo nomine* to attach the defendant's estate, is bad, because it unites two distinct matters of abatement, and might be stricken out on motion. The defendant, therefore, in such a case, is not prejudiced by the refusal of the court to compel the plaintiff to join issue upon it. *Ellison, et al. v. Mounts*, 472
2. A plea in abatement because of a variance between the writ and declaration, is good, if the prayer is "of the writ and declaration, and that the same may be quashed." *Bonneau v. Dickinson & Co.* 475

ACCORD AND SATISFACTION.

1. The plea of accord and satisfaction, is not an admission of the cause of action, when the general issue is also pleaded. *Prince v. Puckett*, 832

ACTION, AND ACTIONS QUI TAM.

1. An administrator cannot sue upon a note, an asset of the estate, which he has taken payable to himself as administrator, after his removal from office, although no successor has been appointed. *Dunham v. Grant*. 105
2. A promise to pay a sum of money for the delivery of a valuable paper, to which the person in possession has no claim, but which belongs to another, cannot be enforced. Nor will it vary the case, that the note which was given for the production of the paper, was made payable to a third person. *McCaleb, use, &c. v. Price*. 753

AMENDMENT.

1. A difference in the amount of damages, which a first and second execution, affirm the plaintiff recovered, is such a clerical misprision, as may be amended in the primary court; and when the record, which shows the variance, and upon which the motion to quash is founded, furnishes the only proper *data* for the correction of the error, it is the duty of the court, *mero motu*, to direct the amendment, and overrule the motion to quash. *Shepard v. Melloy, et al.* 361

AMENDMENT—CONTINUED.

2. An execution may include defendants to the judgment, who did not unite in a forthcoming bond, as well as the obligors in the bond, if forfeited. If the execution does not on its face, or by the indorsement of the clerk, show who were the obligors in the bond, it may be amended by the judgment and forthcoming bond. *Ib.* 561
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APPEALS AND CERTIORARI.

1. Where transcripts are so attached, and the counsel for the plaintiff in error states he is surprised by an objection to the record at the argument in this court, and asserts they were the same used at the trial, this will warrant a *certiorari*, although moved for after argument of the cause. *Quigley v. Campbell & Cleveland*, 58
2. A *certiorari* to review the judgment of a justice of the peace cannot be regularly sued out after the expiration of three years from the rendition of the judgment; and if sued out after that time, is properly dismissed. *Mason & Chambers v. Moore & Tulane*, 578

ARBITRATION AND AWARD.

1. When an award is about being made, between a principal and one of two sureties, touching certain moneys, alledged to have been placed in his hands for the payment of the debt, the other surety will be bound by it, when made, either by assenting to it when made, or by being present with full knowledge that it is about being made, and not dissenting. *McGehee v. McGehee*, 83
2. Such a power does not authorize a submission of matters in dispute to arbitration, at least until after suit brought. *Scarborough v. Reynolds*, 252
3. An authority to an agent, stated thus, "if you can honorably and fairly settle with Reynolds for me, out of court, do so, if not, let the court and jury settle," does not authorize a reference to arbitrators; nor will authority to exercise a reasonable discretion, or to submit to a reasonable sacrifice, confer such power. *Ib.* 252

ARTESIAN WELLS.

1. A contract to bore a well at the rate of \$1 a foot for the first 500 feet—\$2½ for the next 100 feet—\$5 per foot for the next 100 feet—and \$8 per foot for the remaining distance necessary to obtain water—the well to be put in the same finished order as the contractor's best finished wells—payment to be made 1 July, 1841," does not authorize the contractor to abandon the work so long as it is practicable for him to continue boring, and the other party is willing he should continue. *Stewart v. Weaver*, 538
2. The act of the employer's agent, in directing the persons in the workman's employ, to bore the well deeper, is not such an interference as to authorize the contractor to abandon the work. *Ib.* 538

ASSIGNMENTS.

1. An assignment by an insolvent, conveying all his property to trustees, and giving preference to certain creditors, and directing first, the payment of certain preferred creditors, "the surplus, if any, to be appropriated to the other creditors rateably, who shall within four months execute a release of their claims, and if there be any surplus, after fulfilling all the trusts aforesaid, the same shall be paid over to the said R. L. W." is such a stipulation for the benefit of the debtor, as renders the deed fraudulent and void.—
Grimshaw & Brown v. Walker, 101
2. A deed conveying property in trust *absolutely* for the benefit of specified creditors, if *bona fide* is valid as a conveyance, in consequence of the presumed assent of the creditors, and is not a mere power, subject to be defeated by the levy of an execution at the instance of one of the creditors named in it. *Kinnard v. Thompson*, 487

ASSUMPSIT.

1. An action for the breach of a contract under seal, must be brought upon the instrument itself, unless the contract has been subsequently varied by the parties. *Aikin v. Bloodgood*, 221
2. The addition of other work to a building, without any departure from the original plan, does not change the original contract entered into. If no price was agreed on for such additional work a *quantum meruit* would lie for the work so added. *Ib.* 221
3. The failure to finish the work by the time stipulated, is not a rescission of the contract. If accepted by the other party, the objection is waived.—
Ib. 221
4. When a workman undertakes to do work, to be paid for in the notes of third persons, he cannot abandon the contract, and treat it as a money demand, unless the contract has been rescinded, or he has been prevented by the act of the opposite party, from performing it according to its terms.
Ib. 221
5. An action for money had and received, cannot be maintained by a landlord, against a purchaser from the tenant, of the crop grown on the rented land, but he may maintain attachment, under the statute, if the purchaser had knowledge of the *lien* of the landlord. Whether he might not also maintain an action on the case under such circumstances, *quere.* *Dulany v. Dickerson*, 601
6. Nor does it change the effect of the evidence if the receipt expresses to be of the note of the defendant's intestate. Such receipt, by itself, is no evidence of an assumpsit for the plaintiff. *Field's Adm'r v. Bevil.* 608
7. One employed to act as pilot on a steamboat, who is willing, and ready, and offers to act as such, but whose services are refused, may, after the expiration of the term of service, recover the value of his services in in-

ASSUMPSIT—CONTINUED.

- debitatus assumpsit*, and need not alledge any excuse for not performing the contract on his part. *Beckwith, et al. v. Baldwin*, 720
8. Money paid by mistake, by the administrator of an estate, to another administrator, may be recovered back, if demanded before paid out in the distribution of the assets of the estate. *Wilson v. Sergeant*, 778
9. The law implies a promise to pay whenever one has money in his hands belonging to another, which *ex equo et bono*, he has not the right to retain. *Ib.* 778

ATTACHMENT.

1. A motion to dissolve an attachment on the ground that the cause of action does not warrant that process, can properly be entertained when a new, or amended declaration is filed, setting out a cause of action not within the statute, if the motion is made within the time for pleading in abatement.—*Hazard v. Jordan*, 180
2. Process of attachment by one non-resident against another; will lie only for causes of action on which debt, or *indebitatus assumpsit*, could be brought. *Ib.* 180
3. The act of 30th January, 1840, for the collection of rents in the city of Mobile, does not differ from the general attachment law, as it, in effect merely authorizes a suit to be commenced by attachment, for the recovery of rent in the city of Mobile, and is to be governed by the same rule as other suits commenced by attachment. *North v. Eslava*, 240
4. The refusal to quash an attachment, is not revisable on error. *Ellison, et al. v. Mounts*, 472
5. When an attachment returnable to the county court, is levied on property, and a claim is interposed, and bond given to try the right, the trial of the right of property must be had in the same court in which the attachment suit was instituted, and not in the circuit court. *Thompson, guardian v. Evans*, 588
6. A demurrer to the declaration does not reach the objection that the cause of action is one for which attachment will not lie. The proper mode of presenting that question is by a rule on the plaintiff, to show cause why his attachment should not be dissolved. *Beckwith, et al. v. Baldwin*, 720
7. When an attachment is sued upon a debt not due, the declaration should not be filed until the maturity of the contract. *Ib.* 720
8. McD made a verbal contract with G., for a tract of land, and went into possession, by which he agreed to discharge certain judgments against G., and pay the residue to McI. After this, the judgment creditor levied on the land, and before the sale, J., a creditor of G., caused an attachment to be levied upon it. The land was sold, and purchased by McD., the judgment discharged, and for the residue of the purchase money, E. A. & Co. also judgment creditors of G., sued out garnishee process, and sum-

ATTACHMENT—CONTINUED.

- moned McD., who answered, disclosing the above facts, whereupon an order was made, that McI. and J. appear and contest plaintiff's claim—Held, first, that an attachment could be levied on the land by J., after the levy of an execution upon it—second, that the attachment of J. gave him a right to the residue, in the hands of the garnishee, superior to McI., whose title was derived from the verbal promise of the garnishee, made prior to the purchase of the land—third, that J. was properly summoned under the act, requiring all persons who have notified the garnishee, that the debt in respect to which he has been garnisheed, has been transferred, or assigned to them. to be summoned, to contest with the plaintiff, the validity of such transfer—fourth, that any person summoned under this statute, and aggrieved by the judgment of the court, may prosecute a writ of error—and, fifth, that the judgment of E. A. & Co., being posterior to the levy of the attachment of J., would be postponed to it. *Johnson v. Burnett's Adm'r*, 743
9. The *lien* of an attaching creditor, on land, is superior to the title of a purchaser under a subsequent judgment with notice of the levy of the prior attachment. *Baldwin v. Leftwitch*, 838
- See Landlord and Tenant, 6.

ATTORNEY AT LAW.

1. An attorney at law, in virtue of his general powers as such, has no authority to receive depreciated bank paper in payment of a debt placed in his hands for collection, and if he collects in such funds, his client is not bound to accept it.—*West, Oliver & Co. v. Ball & Crommelin*, 340
2. A usage of the attorneys at any particular place, to collect money of their clients in bank bills of the State Bank, though selling at a depreciation, being contrary to law, cannot be supported. But if such a usage were lawful, it would be controlled by the direction of the client not to collect in depreciated funds.—*Ib.* 340
3. B. & C., attorneys in Montgomery, collected by judgment, a debt for a client in New York, and received in payment bank bills of the State Bank of Alabama, with which they purchased a check from the Branch Bank at Montgomery, for the amount of their debt, (less their fee,) which they remitted to the clients, on the 15th June, 1842. On the 23d June, they addressed a letter to the attorneys, refusing to receive the check, and denying their right to collect in depreciated funds, and informing them, they had remitted the check to P. & T. at their risk, for the purpose of exchanging it, or adding to it the amount of the exchange on New York. P. & T. communicated the contents of the letter to the attorneys, but they not offering to do any thing, remitted the check to the clients. On the 21st July ensuing, the clients again wrote to the attorneys, informing them that P. & T. had declined acting in the business for them, and had returned the check, and that it was held subject to their order, and re-

ATTORNEY AT LAW—CONTINUED.

- quiring instructions in regard to it. Alabama bank notes were at a depreciation in Mobile, on the 25th May, 1842, of 25 per cent., and at the time of the receipt by the plaintiffs, of 30 per cent. in New York, at which rate it continued up to the 22d September following, when the clients sold it at this discount. Held, that these facts did not authorize the inference, that the clients had ratified the act of their attorneys—that their silence, when applied to by their clients, was tantamount to a refusal to act, and that after waiting a reasonable time, they had a right to adjust the matter by a sale of the check.—*Ib.* 340
4. An agreement by counsel in one suit, of the existence of a fact, is not proof of the fact, in another suit, with which the former has no connection. *Heirs of Holman, et al. v. Bank of Norfolk,* 370
5. Counsel, who with the consent of the client, withdraws from a case, after having rendered beneficial services, does not thereby lose his right to compensation for the services rendered, unless at the time of his withdrawal, he waives, or abandons his claim to compensation.—*Coopwood, et al. v. Wallace,* 790
6. An attorney at law, who at the instance of the administrators of an estate, has rendered valuable services to the estate, may proceed at once against the estate in equity, to recover his fee, without previously suing the administrators at law, one having removed from this State, and the other being insolvent; and neither having made any charge against the estate for the attorney's fee.—*Ib.* 790
7. An attorney at law cannot recover more than he agreed to receive, by proof that his services were worth more.—*Ib.*

BANK.

1. An allegation in a notice, that the bank would move for judgment on a bill dated the 4th January, 1840, that "it was purchased under the first section of the act of 1843," should be rejected as surplussage. *The State Bank v. Dent and Pattison,* 187
2. The act of 1841, declaring, that a note payable to the cashier, may be sued on and collected as a note payable to the bank, applies equally to notes which were executed at the time of its passage, and to those which have been since made. *Davis, et al. v. Branch Bank of Mobile,* 463
3. T executed a note in blank, and handed it to S, a director of the branch bank at Mobile, to be filled up with the sum of about \$500, and used in the renewal of a note of T, of the same amount held by the bank. S, in violation of the trust reposed in him by T, filled up the note for a much larger sum, and offered it to the bank to be discounted for his own use. The note was discounted by the bank, S sitting as one of the board of directors when the note was taken by the bank, but did not communicate

BANK—CONTINUED.

any of the facts here stated to any other director. Held, that T was liable to the bank on the note. *Terrell v. The Branch Bank at Mobile*, 502

BANK DIRECTORS, &c.

1. In a suit by the bank, against the cashier on his bond, to recover damages, because he had failed to protest a bill of exchange, left with the bank for collection, it was proved that it was the duty of the cashier to attend to this department. It was also proved, that a resolution was introduced by a director, and passed, requiring the cashier so to arrange the duties of the various officers of the bank, as to give to Mr. Ball, (an officer of the bank,) the necessary assistance in his department. Under this resolution, a written memorandum of the various duties of each officer was drawn up and signed by all the officers, except two, by which Mr. Saunders, the second book-keeper, was charged with the duty of attending to the collecting register, and proceeded to discharge, and did discharge, that duty, until after the default complained of. This memorandum, agreed on by the officers of the bank, was by Comegys, laid on the table of the board of directors, when in session, but it was not proved that it was read, or acted on by the board: Held, that it was a reasonable inference, that the board of directors assented to, and approved of this arrangement of the officers of the bank—that as they did not dissent from it, they must be considered as acquiescing in the arrangement so made. *Bank of the State of Alabama v. Comegys, et als.* 772

See Bank, 3.

BANKRUPT, AND ASSIGNEE OF.

1. A motion against a sheriff, for failing to make money on an execution, which had issued in favor of a plaintiff, who, after the rendition of the judgment, had been declared a bankrupt, must be made in the name of the assignee in bankruptcy. *Gary v. Bates, et al.* 544
2. A suggestion by the plaintiff's counsel, of the bankruptcy of the party who instituted the suit, and the substitution of the assignee in bankruptcy as plaintiff, renders inoperative a plea of the defendant previously filed, alledging the bankruptcy of the plaintiff. *Brooks & Wilson v. Harris, assignee,* 555
3. The rights of property of a bankrupt, to which the assignee succeeds, are those rights, to which the bankrupt had either a legal, or equitable title, which could be enforced in a court of justice; the right, therefore, which a bankrupt would have, under a fraudulent assignment of all his property, would not pass to his assignee. *Reavis v. Garner, et als.* 661

See Garnishment and Garnishee, 9.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. When a bill of exchange is drawn in this State, payable "at the Merchants' Bank in the city of New York," this court will take judicial notice that the *city of New York*, is the commercial city of that name, beyond the limits of this State. *Dickinson v. The Branch Bank at Mobile*, 54
2. When a bill is drawn within this State, payable at a place beyond its limits, interest, and damages cannot be recovered of the acceptor, upon its dishonor, without proving the law of the place of payment, giving such damages, and interest. *Ib.* 54
3. It is no objection that interest, and damages for non-payment, are included in the same entry of judgment, without specifying the amount of each, separately. *Ib.* 54
4. A negotiable note, not indorsed before its maturity, may be the subject of an attachment, or garnishment, at the suit of the creditors of the payee, so long as he remains its proprietor, or until the maker has notice of the transfer, if indorsed when past due. *Mills & Co. v. Stewart*, 90
5. In a suit against the assignor of a note, by the assignee, the allegation, that the plaintiff commenced a suit against the maker, to the first court, &c. is sustained by the production of the record of a suit, commenced in the name of the payee, for the use of the plaintiff, if the judgment is still in force, unreversed. *Kain v. Walke*, 184
6. The death and insolvency of the maker of a note, is a sufficient excuse for the failure to prosecute a suit against him, to a return of "no property found" by the sheriff. *Ib.* 184
7. A notice of the non-payment of a promissory note, personally served on the executor of an indorser of the note, or which is shown to have come to his hands, although it may come from a notary protesting the note, will be sufficient to withdraw the claim from the influence of the statute of non-claim, if it describe the note with accuracy, and informs the personal representative, who the holder is, and that he looks to him for payment,—*ORMOND, J. dissenting. Hallett and Walker, ex'rs, v. The Branch Bank at Mobile*, 193
8. Where a suit is brought for the use of another, on a note which, at the trial, appears to be indorsed in blank by several indorsers, and also by the nominal plaintiff, the several indorsements may be filled up at the trial, so as to correspond with the declaration, and that of the nominal plaintiff stricken out. *Pickett v. Stewart*, 202
9. An action may be brought on a lost negotiable note, which had not been negotiated at the time of the loss. *Branch Bank at Mobile v. Tillman*, 214
10. The statute authorising suits to be brought on lost bonds, notes, &c. and requiring an affidavit to be made of the loss, is cumulative, and was not intended to repeal any remedy which previously existed. It is therefore competent to prove by other competent testimony, the loss of an instru-

BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

- ment on which suit is brought, be the effect of the affidavit, when made under the statute, what it may. *Ib.* 214
11. An agreement entered into by a bank, the holder of a bill of exchange, with the acceptor, that if the bill is not paid at maturity, his credit shall not suffer in bank, will discharge an indorser on the bill, who has no knowledge of, and does not consent to the arrangement. But where the indorser has been fully indemnified by the drawer, for whose use the bill was made, indorsed and accepted, he could not avail himself of the want of notice of the dishonor of the bill, or of an arrangement between the holder, and acceptor, which would otherwise have discharged him from liability to the holder. *Posey and Coffee, ex'rs, v. The Decatur Bank*, 802
12. Parol evidence is admissible to show, that a particular bill of exchange was intended to be secured by a deed of trust, though generally, or improperly described in the deed. *Ib.* 802
13. A suit cannot be maintained at law, on a lost bill of exchange, indorsed in blank, whether lost before, or after its maturity, unless an affidavit of the loss be made before suit is brought, as required by the act of 1828. Nor is the case varied by the fact, that the bill was drawn in sets, consisting of first and second, and that the first only, on which the protest was made, is lost, and the second is produced at the trial. *Ib.* 802
- See Evidence, 8.

CARRIERS.

1. Where the proof shows the delivery of a letter or package containing money, to be carried between two places, at each of which is a post office, a recovery may be had on a count charging the defendant as a bailee to deliver the money on request, even if the contract to carry is conceded to be invalid, as opposed to the post office laws. *Hosea, Jr. v. McCrory*, 349
2. Although ordinarily a steamboat may not be compelled to take charge of a cash letter, yet if the general usage of boats in a particular trade to take charge of such letters is shown, the delivery of such a letter to a particular boat, will be governed by this common usage. *Ib.* 350
3. The delivery of a cash letter to the clerk of a steamboat, is a delivery to the master for the purpose of charging him, and it is not necessary to show a special authority to the clerk to receive cash letters, when a general usage of boats in the trade is to receive them. *Ib.* 350

CHANCERY.

1. When the vendor entering into such a contract becomes insolvent before the price is paid, and the purchaser shows an outstanding incumbrance created by the vendor, he will be entitled to relief in a court of equity. *Hunter v. O'Neil*, 38

CHANCERY—CONTINUED.

2. But, unless the money is actually tendered upon condition that a title is made, the only relief is to enjoin the vendor from proceeding for the price until he gives indemnity against the outstanding incumbrance. *Ib.* 38
3. A court of chancery has jurisdiction to set aside a deed, conveying either land or slaves fraudulently obtained. *Rumph v. Abercrombie,* 64
4. A contract for the sale of slaves at an inadequate price, obtained by an abuse of confidence, reposed in the vendor, by the vendee, will be set aside in equity, especially in a case, where the vendor was in a weak condition of body, and in a gloomy, unsettled state of mind, so as to be peculiarly liable to imposition. *Ib.* 64
5. Equity has jurisdiction to set aside the fraudulent transfer of a debt reduced to judgment, although the party may also be entitled to a legal remedy by a garnishee process, against the fraudulent transferee. *Sheppard, et al. v. Iverson,* 97
6. An assignment by an insolvent, conveying all his property to trustees, and giving preference to certain creditors, and directing first, the payment of certain preferred creditors, "the surplus, if any, to be appropriated to the other creditors rateably, who shall within four months execute a release of their claims, and if there be any surplus, after fulfilling all the trusts aforesaid, the same shall be paid over to the said R. L. W." is such a stipulation for the benefit of the debtor, as renders the deed fraudulent and void.—*Grimshaw & Brown v. Walker,* 101
7. When the decree settling the equities in a suit against a non-resident, directs that it shall be suspended until the statutory bond is given, *quere*, whether a final decree afterwards rendered, during the same term, upon the report of the master, upon a reference directed by the former decree is not within its reservation. *Johnson v. Elliott,* 112
8. It is error to decree a sum certain to a widow in lieu of dower, to be raised by a sale of the entire estate out of which the dower interest arises. The decree should be for the payment annually of the sum ascertained to be the annual value of the dower interest. *Ib.* 112
9. A bill in enquiry, by which a *feme covert* asserts her marital rights against her husband; or seeks to have settled to her separate use, property, which he has purchased with her separate funds, is not such a proceeding *in rem*, as to make the decree therein rendered, conclusive on all persons; but is binding only on the parties to it. *The Pranch Bank at Montgomery v. Hodges,* 118
10. A promise by a father to a son, that if he will remove from North Carolina and settle in Alabama, he will give him a particular plantation and slaves, cannot be enforced in equity by specific performance as a contract, it being a mere gratuity, although the son is induced by it to break up at a loss, and is put to trouble and expense in the removal. *Forward, et al. v. Armistead,* 124

CHANCERY—CONTINUED.

11. Part performance of such a promise, by putting the son in possession of the plantation and slaves, and his making improvements on the lands, will not warrant a court of equity in decreeing a conveyance by the heirs or devisees of the father after his death, no conveyance or written agreement to convey, or promise to convey, being proved. *Ib.* 124
12. A purchase made under a decree in chancery, foreclosing a mortgage, is *prima facie* valid, against a subsequent judgment creditor of the same debtor. But if the debt of the subsequent judgment creditor, existed at the time of the rendition of the decree in chancery, under which he claimed, the *onus* is cast on him of showing, that the decree was rendered for a debt due from the debtor to the complainant, he being also the purchaser. *Simerson v. The Branch Bank at Decatur.* 205
13. If the party elects his remedy in chancery, it is not necessary to make the principal debtor, or an insolvent co-surety a party. *Couch v. Terry's Adm'rs,* 225
14. An allegation in a bill in chancery, brought to perfect the title to land, that B. held the deed of the administratrix, by virtue of a sale made of one-half the property under the authority of the act of the legislature, as cited, is a sufficient allegation of title in B, without an allegation, that the bond required by the statute to be executed previous to the sale, was in fact executed, and being put in issue by the heirs, those claiming under B. may prove the execution of the bond. *Heirs of Holman, et al. v. Bank of Norfolk,* 369
15. The order to examine a co-defendant as a witness, does not ascertain his competency to testify, and if at the hearing, it appears he was interested, his testimony will be rejected. *Ib.* 370
16. A party improperly made a defendant, and who wishes to be discharged without the payment of costs, must not only disclaim all interest in the controversy, but must also abstain from engaging in the defence of the suit. *Ib.* 370
17. A bill is not multifarious, because it seeks to foreclose a mortgage upon an entire tract of land; and asks a specific performance as to one-half the land, from the heirs of the vendor of the mortgagor. *Ib.* 370
18. Upon a bill filed by B, or those claiming under him, against the heirs of H., for a specific performance of this contract, B having taken possession under it, the instrument is *prima facie* evidence under the statute, that it was made upon sufficient consideration. *Ib.* 370
19. A decree may be made against one of two heirs, who submits to the jurisdiction, though the other from *non-residence*, cannot be made a party to the bill. *Ib.* 370
20. An allegation, that a mortgagor was seized, or pretended to be seized in fee simple of the land, when he executed the mortgage, is a sufficient allegation that he was in possession. *Ib.* 370

CHANCERY—CONTINUED.

21. A mortgagee may release a part of the mortgaged estate, from the operation of his mortgage, without impairing his right to look to the residue ; and this, although subsequent to the mortgage, the mortgagor had transferred a part of the estate to others. Whether equity would not grant relief on the ground of fraud, if the mortgagee should collude with the mortgagor, to make the burthen fall on a sub-purchaser of the mortgagor, *Quere. Ib.* 371
22. *Non-residents* may be made parties to suits in chancery, whether infants, or adults, by publication, when the contract out of which the suit arises, is made in this State, or when any act is done by the non-resident in this State, justifying the interference of chancery, or when he asserts title to property in this State, in virtue of some act or transaction, which took place within this State. *Ib.* 371
23. H executed two deeds of trust to secure to C the payment of certain debts recited in the deed. A sale was made under the deeds, and C became the purchaser, but the property purchased was left with H. After this, C brought actions of detinue against H, and recovered the property, with damages for its detention. To reverse these judgments, H prosecuted writs of error to the supreme court, where the judgments were affirmed with damages ; which judgments have since been satisfied, except as to damages and costs. H, a surety in the bonds for the prosecution of the writs of error, then filed his bill, alledging that the deeds of trust between H and C were fraudulent, and that he was a creditor of H, upon debts due him before, and since the execution of the deeds of trust, and including a judgment which he had purchased against H, rendered since the execution of the deeds, and prayed, that the damages recovered by C from H, for the detention of the property, be applied to the payment of the judgment, of which he was the proprietor. Held, that there was no equity in the bill, to apply the damages for the detention of the property to the payment of the creditors of H, whatever might be the rule, if C were attempting to enforce a delivery of the property itself. *Hudson v. Crutchfield, et al.* 433
24. A motion may be made a second time, for the dissolution of an injunction after a refusal to dissolve, accompanied with a reservation, that the motion might be renewed. *Ib.* 434
25. An allegation in a bill, that by the term "re-sell," the parties meant *re-convey*, is not sufficient to authorize the introduction of parol proof, contradicting the written instrument. *McKinstry v. Conly,* 678
26. A court of equity will relieve against a sale of the equity of redemption to the mortgagee, for a grossly inadequate price. *Ib.* 678
27. A party may go into equity, to remove a cloud which hangs over his title, either by an actual, or threatened sale of the land to another. *Burt v. Causety,* 734

CHANCERY—CONTINUED.

28. A decree of the court of chancery, appointing a trustee to sue under a deed of trust, is final as to this matter, and binding alike on strangers, as on parties to the decree. *Griffin v. Doe ex dem. Stoddard and Murphy*, 783
29. An attorney at law, who at the instance of the administrators of an estate, has rendered valuable services to the estate, may proceed at once against the estate in equity, to recover his fee, without previously suing the administrators at law, one having removed from this State, and the other being insolvent; and neither having made any charge against the estate for the attorney's fee. *Coopwood, et al. v. Wallace*, 790
- See Deeds of Trust, 3.
- See Mortgagor and Mortgagee, 8.
- See Vendor and Vendee, 12.

CONFUSION OF GOODS.

1. Where wood has been converted and made into coal, by the defendant, the owner is entitled to maintain trover for the coal. *Riddle v. Driver*, 590

CONSIDERATION.

1. An agreement entered into without consideration, by the maker of a note, with one who at the time is the owner of the note, to exchange it for other notes, then held by the maker against him, cannot be enforced against a subsequent plaintiff, for whose use suit is brought on the note. *Sawyer v. Hill, use, &c.* 575
2. A consideration of \$10, expressed in a deed of gift of two slaves, is on its face merely nominal. *Felder v. Harper*, 612
3. A promise to pay a sum of money for the delivery of a valuable paper, to which the person in possession has no claim, but which belongs to another, cannot be enforced. Nor will it vary the case, that the note which was given for the production of the paper, was made payable to a third person. *McCaleb, use, &c. v. Price*. 753
4. A deed of trust conveying land by the members of a mercantile company, for the payment of the debts of the partnership, and requiring the trustee to sell at the instance of any creditor of the firm, is founded on sufficient consideration; the company having gone into existence, contracted debts, and there being unsatisfied creditors of the firm. *Griffin v. Doe ex dem. Stoddard and Murphy*, 783

CONSTITUTIONAL LAW.

1. An act of the legislature of this State, authorizing the administratrix of O. H., of the city of Boston, to sell certain real estate of O. H., in the city of Mobile, and requiring a bond to be executed with sufficient security, payable to the judge of the county court of Mobile, for the true and faithful payment of the money arising from the sale into the hands of the ad-

CONSTITUTIONAL LAW—CONTINUED.

ministratrix, to be appropriated to the payment of the debts due by the deceased—is not an exercise of judicial power by the legislature, or contrary to the constitution of this State. If in fact the estate was not insolvent, so as to authorize a sale of the real estate by order of the orphans' court, the heirs, on coming of age, may assert title. It does not invalidate the law, that citation was not required to be made to the heirs previous to the sale, and that the administratrix resided in Massachusetts. *The Heirs of Holman, et al. v. The Bank of Norfolk*, 369

CONTRACT AND AGREEMENT.

1. Under a special contract to sell slaves to one upon the payment of a sum certain at a specified day, the title vests in the party to whom they are to be sold, by the tender of the money, and when the tender is made by an administrator and refused, yet the administrator, by the act of tender and refusal becomes the bailee of the money, and as such may be sued by the executor of the other party, where he has successfully sustained an action of detinue, on the ground that the title vested in the estate by the act of tender. *McLeod v. Powe and Smith*, 9
2. A contract for the sale of slaves at an inadequate price, obtained by an abuse of confidence, reposed in the vendor, by the vendee, will be set aside in equity, especially in a case where the vendor was in a weak condition of body, and in a gloomy, unsettled state of mind, so as to be peculiarly liable to imposition. *Rumph v. Abercrombie*, 64
3. A promise by a father to a son, that if he will remove from North Carolina and settle in Alabama, he will give him a particular plantation and slaves, cannot be enforced in equity, by specific performance as a contract, it being a mere gratuity, although the son is induced by it to break up at a loss, and is put to trouble and expense in the removal. *Forward, et al. v. Armstead*, 124
4. Part performance of such a promise, by putting the son in possession of the plantation and slaves, and his making improvements on the lands, will not warrant a court of equity in decreeing a conveyance by the heirs or devisees of the father after his death, no conveyance or written agreement to convey, or promise to convey, being proved. *Ib.* 124
5. An action for the breach of a contract under seal, must be brought upon the instrument itself, unless the contract has been subsequently varied by the parties. *Aikin v. Bloodgood*, 221
6. The addition of other work to a building, without any departure from the original plan, does not change the original contract entered into. If no price was agreed on for such additional work a *quantum meruit* would lie for the work so added. *Ib.* 221
7. The failure to finish the work by the time stipulated, is not a rescission of

CONTRACT AND AGREEMENT—CONTINUED.

the contract. If accepted by the other party, the objection is waived.—
Ib. 221

8. When a workman undertakes to do work, to be paid for in the notes of third persons, he cannot abandon the contract, and treat it as a money demand, unless the contract has been rescinded, or he has been prevented by the act of the opposite party, from performing it according to its terms.

Ib. 221

9. A contract to bore a well at the rate of \$1 a foot for the first 500 feet—\$2½ for the next 100 feet—\$5 per foot for the next 100 feet—and \$8 per foot for the remaining distance necessary to obtain water—the well to be put in the same finished order as the contractor's best finished wells—payment to be made 1 July, 1841," does not authorize the contractor to abandon the work so long as it is practicable for him to continue boring, and the other party is willing he should continue. *Stewart v. Weaver*, 538

10. The act of the employer's agent, in directing the persons in the workman's employ, to bore the well deeper, is not such an interference as to authorize the contractor to abandon the work. *Ib.* 538

11. One part owner of a steamboat, has not the power to charge another part owner, by contracting debts in his name. *Brooks & Wilson v. Harris*, 555

12. An agreement entered into without consideration, by the maker of a note, with one who at the time is the owner of the note, to exchange it for other notes, then held by the maker against him, cannot be enforced against a subsequent plaintiff, for whose use suit is brought upon the note. *Sawyer v. Hill, use, &c.* 575

13. It is no ground for the rescission of a contract for the sale of land, that one who sold the land as agent, had no authority to act, if the principal ratifies his act, and is able, and willing to make title. *Alderson v. Harris & Merrill*, 580

See Bills of Exchange and Promissory Notes, 11.

See Pre-emption Law, 2.

CORPORATION.

1. An authority conferred on the corporation, to collect taxes on "auctioneers, transient dealers, and pedlars," will justify it in imposing a tax either upon the amount of the sales of such persons, or in the form of a license to the auctioneer. *Carroll & Beall v. The M. & A. of Tuscaloosa*, 173

2. A party who complains that too high a tax has been assessed against him as an auctioneer, and removes the case by *certiorari* to the circuit court, is there entitled, if he demands it, to a trial upon the merits, and to show that too high a tax has been assessed; though in cases of ordinary taxation, it seems redress must be sought from the mayor and aldermen, and that their decision is final. *Ib.* 173

COSTS AND SECURITY FOR.

1. A party improperly made a defendant, and who wishes to be discharged without the payment of costs, must not only disclaim all interest in the controversy, but must also abstain from engaging in the defence of the suit. *Heirs of Holman, et al. v. The Bank of Norfolk.* 370
2. In such a case, although the proceedings are set on foot by a junior incumbrancer, to enjoin a senior incumbrancer from proceeding to sell under his mortgage, the costs of suit are properly payable by the incumbrancer, to be re-imbursed out of the fund produced by the sale of the mortgaged property. *Pinkard v. Ingersoll,* 441
3. The clerk's fees for making out the transcript upon a writ of error to the supreme court, are not taxed as part of the costs of the supreme court, but should be taxed as costs accruing upon the judgment in the primary court. *McCord, v. Boyd, et al. use, &c.* 760

COURT, SUPREME.

1. The clerk's fees for making out the transcript upon a writ of error to the supreme court, are not taxed as part of the costs of the supreme court, but should be taxed as costs accruing upon the judgment in the primary court. *McCord v. Boyd, et al. use, &c.* 760

COURT, CHARGE OF.

1. A charge moved for, cannot be considered abstract, when there is any evidence before the jury to warrant the proposition. *Bradford v. Marbury,* 520
2. When testimony is too indefinite, and inconclusive, to warrant the court in saying that one thing or another is proved by it, it should refuse a charge assuming that certain facts are established. *Ib.* 520
3. A charge given by the court, must be construed, in connection with the testimony to which it applied. *Berry, use, &c. v. Hardman,* 604

COVENANT.

1. An obligation to make a deed to certain lands when the price contracted for is paid, is in law a covenant to make a good title when the condition is performed by the purchaser. *Hunter v. O'Neil,* 37
2. The covenants for quiet enjoyment, and never to claim or assert title to the premises, are real covenants, running with the land, and if broken after the land has been conveyed to an assignee, the latter alone has the right to sue for damages; unless, by the nature and terms of the assignment, the assignor is bound to indemnify the assignee, when it seems he may sue in his own name. *Claunch v. Allen,* 159
3. The words "grant, bargain, sell," are all necessary in a deed, to create the statute covenant, that the grantor was seized of an indefeasible estate in fee simple, &c. and for quiet enjoyment. *Ib.* 159

COVENANT—CONTINUED.

4. The condition of a bond reciting that the title to a lot of land is in dispute and stipulating that the obligor shall satisfy that dispute, and keep the obligee, his heirs, &c. in possession forever, and pay him all such damages as he may sustain by the pretended claim set up to the lot, is to be construed as a covenant to satisfy the outstanding incumbrance, or remove the outstanding title, as the case may be, within a reasonable time; and if not so done by the obligor within a reasonable time, the obligee may pay the incumbrance, or remove the outstanding title, and have his action on the bond for indemnity. *Dickson, jr. v. Briggs*, 217
5. Where the disputed title covenanted to be satisfied, consists in the claim of a former vendor, for notes given by a former purchaser, to whom no deed was executed, these notes constitute a lien, which the obligee may remove on the default of the obligor, and recover the sum paid, by action on the covenant. *Ib.* 217
6. Upon an agreement under seal for the payment of \$324, in monthly instalments of \$27, covenant will lie for any of the instalments, as they fall due; but a declaration which counts for a part of a month not due, and also for the residue of the unexpired term, is bad on demurrer. Whether debt would lie before all the instalments are due, *quere.* *North v. Eslava*, 240
7. A covenant, by which H bound himself to give B a quit-claim deed to one half a tract of land, (which is described,) "to be executed within two years from the date," is not a contract for the sale of land, within the meaning of the statute of frauds, but is an unconditional promise to convey, by a time stipulated, and is *prima facie* evidence, that the consideration had been paid, or performed. *Heirs of Holman, et al. v. Bank of Norfolk*, 370
8. G., purchased from A. a tract of land, knowing that the title was outstanding in another, executed his notes for the purchase money, and took from him a conveyance by deed. Afterwards, J., the assignee of the notes, executed a covenant to G., by which, in consideration that G. paid him \$4000 by the first Monday in April, 1841, he bound himself to procure, and deliver to G., a fee simple title to the land, at the time agreed on for the payment. J. immediately commenced proceedings to get in the outstanding title, but was unable to do so before 1846, previous to which he had coerced the payment of the money from G. by execution. An action being brought by G., against J., on the covenant, after the payment of the money, and before the title was obtained by J.—Held, that the measure of damages could not exceed the expense, and trouble of obtaining the legal title, and when that was obtained and vested in the plaintiff before the trial of the cause, the damages should have been merely nominal. *Gibbs v. Jemison, Adm'r*, 820

CRIMINAL CASES, AND PROCEEDINGS IN.

1. When the bill of exceptions in a criminal case does not state evidence before the jury, to warrant the particular instructions asked and refused, the legal presumption of the omission is, that there was no such evidence.
Pierson v. The State. 149
2. The common law of this State on the subject of *homicide*, is the same as the common law of England, and whenever that law requires the person assailed to decline the contest, or to retreat, before he will be excused in taking the life of his adversary, our law requires the same. *Ib.* 149
3. The circumstance that the prisoner, after the killing, wipes the knife with which the fatal wound is inflicted, is not so controlling, or so insignificant as to warrant the prisoner in calling for the charge that it is not evidence of murder, or to justify the court in instructing the jury that it was. It is a fact evincing coolness and self-possession, and as such, proper to be left to the jury, in connection with the other circumstances of the case, for them to determine whether the killing was with malice aforethought, or on sudden heat and passion. *Ib.* 149
4. It is not error for the court to refuse to instruct the jury, that they in capital cases are judges of the law, as well as of the fact. *Ib.* 149
5. To constitute the offence of obstructing process, in a criminal point of view, there must be an active opposition; not merely taking charge of a debtor's property, keeping it out of view, and refusing when called on by an officer, to place it within his reach. *Crumpton v. Newman,* 199
6. A warrant, which recited, that W C did oppose W A, a constable, in the execution of civil process, by concealing, and keeping concealed, the property of one James Frost, is a nullity, and the party who caused it to be issued, as well as the officer who acted under its authority, are liable in trespass to the party arrested. *Ib.* 199
7. The place where a contemplated duel is to be fought, is no part of the definition of the offence, and not necessary to be averred in the indictment or proven on the trial. *Ivey v. The State,* 276
8. An allegation, that the prisoner gave the prosecutor a challenge to fight in single combat, is equivalent to an averment that he *challenged* him to fight. *Ib.* 277
9. No particular form of words is necessary to constitute a challenge to fight a duel; whether a challenge to fight in single combat, with deadly weapons was intended, or whether it was the mere effusion of passion, or folly, or the idle boast of a braggart, not intended at the time to lead to any result, or to be understood by the other party as a challenge to fight a duel, are questions which the jury must determine. *Ib.* 277
10. One indicted as principal, cannot be convicted on proof showing him to be only an accessory before the fact. *Hughes v. The State,* 458

CRIMINAL CASES, PROCEEDINGS IN—CONTINUED.

11. As an assault, with intent to commit murder, is made a felony by the penal code, it is an offence to which there may be accessories. *Ib.* 459
12. Where the jury, upon an indictment for assault and battery with intent to commit murder, and for an ordinary assault, return a general verdict of guilty, or a verdict finding one defendant guilty of an assault with *intent to kill*, and the other, guilty of an assault and battery, without assessing a fine, it is no error in the court to send the jury out, with instructions to return a final verdict. *Ib.* 458
13. The dying declaration of one deceased, made under the belief of impending death, is competent proof to go to the jury, either to show who is the guilty agent, or disclose the circumstances under which the crime was committed. *Moore v. The State,* 764
14. These declarations may be given in evidence, as well to acquit, as to convict the prisoner. *Ib.* 764
15. The dying declaration of a husband, is competent evidence against the wife, to show her guilt. *Ib.* 764
16. When these declarations are inconsistent with each other, it is the duty of the jury to weigh them, and to determine which, or whether either is to be believed; and if the charge of the court takes this duty from them, or if the court undertakes to determine these questions for the jury, it is error. *Ib.* 764
17. If an officer having a *fieri facias*, attempts to levy it on articles exempt by law from levy, and sale by execution, after being warned of the fact, the owner may employ as much force, as is necessary to prevent the levy, but if he employs more force than is necessary, he becomes a trespasser. *The State v. Johnson,* 840
18. Two indictments, one for resisting legal process, and the other for an assault, cannot be supported for the same offence. The decisive test, is, whether the same testimony will support both charges. *Ib.* 840
See Recognizance, 1.

CUSTOM OR USAGE.

1. A usage of the attorneys at any particular place, to collect money of their clients in bank bills of the State Bank, though selling at a depreciation, being contrary to law, cannot be supported. But if such a usage were lawful, it would be controlled by the direction of the client not to collect in depreciated funds. *West, Oliver & Co. v. Ball & Crommelin,* 340
2. Although ordinarily a steamboat may not be compelled to take charge of a cash letter, yet if the general usage of boats in a particular trade to take charge of such letters is shown, the delivery of such a letter to a particular boat, will be governed by this common usage. *Hosea, Jr. v. McCrory,* 350

CUSTOM OR USAGE—CONTINUED.

3. The delivery of a cash letter to the clerk of a steamboat, is a delivery to the master for the purpose of charging him, and it is not necessary to show a special authority to the clerk to receive cash letters, when a general usage of boats in the trade is to receive them. *Ib.* 350
4. A usage, that where cotton stored in a warehouse, was found to be in a damaged condition, the warehouseman should send it to a "pickery," to be "picked," and that the factor should be responsible for the expense of picking, is not unreasonable, or contrary to law. *Desha, Smith & Co. v. Holland,* 513
5. It is not indispensable to the validity of a custom, that it be universally acquiesced in; it is sufficient, if it be general, and uniform. *Ib.* 513
6. The evidence to establish a custom, should show a certain, and uniform usage. Where the evidence is uncertain, and contradictory, the custom is not established. *Ib.* 513

DAMAGES.

1. When a bill is drawn within this State, payable at a place beyond its limits, interest, and damages cannot be recovered of the acceptor, upon its dishonor, without proving the law of the place of payment, giving such damages, and interest. *Dickinson v. The Branch Bank at Mobile,* 54
 2. It is no objection that interest, and damages for non-payment, are included in the same entry of judgment, without specifying the amount of each, separately. *Ib.* 54
 3. A defendant, by electing to *recoup* the damages, when sued for a breach of contract, thereby precludes himself from afterwards suing for damages, for the same injury, but may still maintain an action for a trespass, which could not have been *recouped* in the former action. *McLane v. Miller,* 643
- See Covenant, 9.
- See Execution, writ of, 9.

DEBTOR AND CREDITOR.

1. The law of South Carolina, where the deed was made, requires such instruments to be recorded, and for want of such registration, declares them void, as to creditors, but that as between the parties to the deed it shall be valid without registration. Held, that the provision in relation to creditors, had no *extra territorial* efficacy as a law, and only applied to debts created, or attempted to be enforced, in South Carolina. *Cook v. Kennerly & Smith,* 42
2. A plea, alledging that the defendant had been garnisheed in a court of the State of Louisiana, and a judgment rendered against him on his answer, condemning the debt in favor of a creditor of the plaintiff, setting out the proceedings fully, and alledging that they were conducted according to the law of Louisiana, and that he had paid, and satisfied the judg-

DEBTOR AND CREDITOR—CONTINUED.

- ment so rendered, is good. It is not necessary in such a plea to alledge, *in totidem verbis*, that the defendant had no notice of the transfer of the note, when he answered the garnishment. *Mills & Co. v. Stewart*, 90
3. An assignment by an insolvent, conveying all his property to trustees, and giving preference to certain creditors, and directing first, the payment of certain preferred creditors, "the surplus, if any, to be appropriated to the other creditors rateably, who shall within four months execute a release of their claims, and if there be any surplus, after fulfilling all the trusts aforesaid, the same shall be paid over to the said R. L. W." is such a stipulation for the benefit of the debtor, as renders the deed fraudulent and void.—*Grimshaw & Brown v. Walker*, 101
4. Where a debtor owing two debts to his creditor, pays a sum of money in gross, and the creditor omits to apply it to either, the debtor, when sued on one of the debts, may insist on the payment to be applied in discharge of that, although the creditor has delayed both debts. *Quere*, if the payment was made for the purpose of extending both debts, and receipted in this way, whether it should not be applied *pro rata*? *Dent, et al. v. The State Bank*, 275
5. Although a slave has been lent, and continued in possession of the borrower for more than three years, without the registration required by the statute of frauds, if the owner resumes the possession, before any creditor of the borrower has acquired a *lien* upon it, it cannot be afterwards made subject to the debts of the borrower. *Maull v. Hays*, 499
6. In a contest between a purchaser from the grantor with notice of the deed, and a creditor of the firm seeking to enforce it, the former is in no better condition than the grantor. *Griffin v. Doe ex dem. Stoddard and Murphy*, 784
- See Lien, 6.
- See Mortgagee and Mortgagor, 6, 7.
- See Vendor and Vendee, 6, 7, 8, 9.

DEEDS AND BONDS.

1. The mere fact, that the entire consideration recited in a deed has not been paid, or that it is not a full equivalent for the property conveyed, does not *per se* make the deed void, though it may cast suspicion over the transaction, and authorize a verdict against it. *McCaskle v. Amarine*, 18
2. When a gift of slaves is made by deed, the delivery of the deed is sufficient, without a delivery of the property. *Newman v. James & Newman*, 29
3. The words "grant, bargain, sell," are all necessary in a deed, to create the statute covenant, that the grantor was seized of an indefeasible estate in fee simple, &c. and for quiet enjoyment. *Claunch v. Allen*, 159

DEEDS AND BONDS—CONTINUED.

4. A penal bond, made by the widow, jointly with the administrator, to make the purchaser a good title to the land, estops her from asserting title against him, under the title derived from the patent from the government. *Johnson and wife, et al. v. Collins*, 322
5. The grantor in a deed is a competent witness to impeach it for fraud, if he was not interested in some way to render him incompetent on that ground. *Sims v. Killen*, 497
6. A bond in the penal sum of \$10,000, by which B bound himself, on condition that D would establish the claim of B, to a right of entry under the pre-emption laws of the United States, and pay to the United States the purchase money thereof, he would deliver to D, his heirs and assigns, a good and sufficient deed of all his right, and title to one half of said lands—is not such an estate, or interest in land in D, though the condition of the bond has been performed, as can be sold by order of the orphans' court, at the instance of the representatives of D, so as to vest in the purchaser the title of D, or to enable the commissioners appointed by the orphans' court, to assign the bond to the purchaser. *Brown v. Chambers, et al.* 697
7. Such a bond is assignable under the act of 1828, and the assignee may maintain an action thereon in his own name, by showing a performance of the condition by the obligee. Whether, after the death of the obligee, the heir, or personal representative is entitled to the bond, *quere. Ib.* 698

DEEDS, AND REGISTRY OF.

1. A deed is not properly recorded upon the affidavit of the subscribing witnesses, "that they acknowledged their signatures to this deed." *McCaskle v. Amarine*, 17
2. It is no objection to the validity of a deed, that it is not recorded, except as to creditors and subsequent purchasers. The notice of title given by possession is equivalent to the constructive notice afforded by registration of the deed. *Ib.*
3. When property is conveyed absolutely, to a married woman, by a stranger, the statute of frauds has no application, in a contest between the wife and the creditors of the husband; it is therefore unimportant, whether the instrument is, or is not recorded. *Newman v. James & Newman*, 29
4. The law of South Carolina, where the deed was made, requires such instruments to be recorded, and for want of such registration, declares them void, as to creditors, but that as between the parties to the deed, it shall be valid without registration. Held, that the provision in relation to creditors, had no *extra territorial* efficacy as a law, and only applied to debts created, or attempted to be enforced, in South Carolina. *Cook v. Kennerly & Smith*, 42

DEEDS, AND REGISTRY OF—CONTINUED.

5. The possession of the *cestui que trust*, is not within the second section of the statute of frauds. *Quere*, would it not apply to a trustee, who retained possession of the trust estate, without registration of the deed. *Ib.* 42
6. The assignment of a land certificate, made by the original purchaser, under his hand and seal, operates under our statute as a conveyance of all the assignor's interest in the land, and the assignee has a superior title at law, to a purchaser at a sheriff's sale under a judgment rendered subsequent to the assignment. *Falkner v. Jones and Leith*, 165
7. Such an assignment is not within the registration acts, and does not become inoperative against the sheriff's vendee for the omission to register it. *Ib.* 165
8. An assignment of a certificate not under seal, does not pass the legal title, and is not proper evidence in an ejectment suit by a sheriff's vendee. The improper admission of merely cumulative evidence, is sufficient to reverse a judgment. *Ib.* 165
9. A purchaser of a slave at a constable's sale, who has notice of an unregistered mortgage on the slave, may nevertheless protect himself, if the plaintiff in execution had no notice of the mortgage, until after his *lien* attached by the levy of his execution. *Jordan v. Mead*, 247
10. A mistake made by the clerk, in the date of the probate of a deed, cannot prejudice the party, or prevent him from proving the true date of the probate. *Ib.* 247
11. A deed of trust not delivered for registration, or recorded, until thirty-one days after its execution, is void as against judgment creditors, not having actual notice of the deed. *Wallis v. Rhea & Ross*, 646
12. Possession of land under a purchase, is notice to a creditor, and will prevent the *lien* of his judgment against the vendor from attaching upon it, though the deed may never have been recorded. *Burt v. Cassety*, 734
13. A deed drawn by an attorney, for land, by the direction of the vendor, is sufficiently delivered to the vendee, though not present, if left with the attorney for the purpose of registration, or, after its execution, taken by the vendor, for the purpose of being handed to the clerk to be registered. *Ib.* 734

DEEDS OF TRUST.

1. A deed conveying property in trust *absolutely* for the benefit of specified creditors, if *bona fide* is valid as a conveyance, in consequence of the presumed assent of the creditors, and is not a mere power, subject to be defeated by the levy of an execution at the instance of one of the creditors named in it. *Kinnard v. Thompson*, 487
2. A deed of trust not delivered for registration, or recorded, until thirty-one days after its execution, is void as against judgment creditors, not having actual notice of the deed. *Wallis v. Rhea & Ross*, 646

DEEDS OF TRUST—CONTINUED.

3. A deed of trust, or mortgage, executed as an indemnity to the sureties of an executor, will be upheld at law, whilst the liability continues. *Quere*—would not a court of equity, upon a proper indemnity being executed, direct a sale of the trust property, at the instance of a creditor of the grantor.
Hawkins v. May, 673
4. The possessory interest of a grantor in a deed of trust, which may be sold under execution, is a certain, ascertained possession, for a definite period.
Ib. 673
5. A deed of trust conveying land by the members of a mercantile company, for the payment of the debts of the partnership, and requiring the trustee to sell at the instance of any creditor of the firm, is founded on sufficient consideration; the company having gone into existence, contracted debts, and there being unsatisfied creditors of the firm. *Griffin v. Doe ex dem. Stoddard and Murphy*, 783
See Bankrupt, 3.
See Chancery, 23.

DELIVERY.

1. When goods are delivered to a warehouseman, or carrier, indicated by the buyer, a delivery to the warehouseman, or carrier, is a delivery to the buyer, and it is at his risk when delivered, without notice, unless by the contract of the parties, he is to be notified of the fact of delivery. *Bradford v. Marbury*, 520
2. A delivery to a warehouseman will be complete, although the seller should take the receipt in his own name, unless his intention in taking the receipt in his own name, was to preserve the right of property in himself—
Ib. 520
3. When property is delivered to a warehouseman, indicated by the buyer, the right of property will vest in him, though the warehouseman may have a *lien* on the goods for his charges. Whether such a *lien* would in any case prevent the general property from vesting in the buyer, if the requisites of the sale were complete, *quere. Ib.* 520

DEMURRER.

1. A plea is bad on demurrer, which assumes to answer the entire declaration, and to furnish a bar to the action, and alleges matter which is an answer to only a part of the demand. *Mills & Co. v. Stewart*, 90
2. A declaration averring that the defendant undertook to collect a *certain debt*, without showing for what sum, is bad on demurrer. *Posey v. Hair*, 567
3. A demurrer to the declaration does not reach the objection that the cause of action is one for which attachment will not lie. The proper mode of presenting that question is by a rule on the plaintiff, to show cause why his attachment should not be dissolved. *Beckwith, et al. v. Baldwin*, 720

DEPOSITION.

1. The rule that a witness cannot be contradicted by proof of previous counter declarations, either written or verbal, applies to testimony taken by deposition, and if such supposed contradictory declarations, exist at the time the deposition is taken, the witness must have the opportunity afforded him of explaining it if in his power. *Howell v. Reynolds*, 128
2. Depositions taken between the same parties, may be given in evidence in another suit, where the same point is in issue. *Heirs of Holman, et al. v. Bank of Norfolk*, 370
3. When the object is not to establish the facts stated by a witness, but to impeach his credit, a deposition made by him in another suit, and between other parties, is evidence to contradict him. The rule of law established in the Queen's case, does not apply. *Ib.* 370
4. Where a deposition of a witness comes through the mail sealed, directed to the clerk of the proper court, with the usual post-marks, it may be published, although the name of the commissioner is not written across the seal. *Park v. Bancroft*, 468

DETINUE.

1. A demand is not necessary when the action is detinue, although the defendant, previous to the action, held possession under one having the life interest. *Dunn, et al. v. Davis*, 135
2. A judgment cannot be rendered against an administrator in detinue, where the suit has been revived against him, unless the thing sued for was in the hands of his intestate at the time of the suit brought, or has since come to the possession of the personal representative, and held by him as assets of the estate. *Easley, adm'r, &c. v. Boyd*, 684
3. The defendant in the action of detinue, may show title in a third person. *McCurry v. Hooper*, 823

DOWER.

1. It is error to decree a sum certain to a widow in lieu of dower, to be raised by a sale of the entire estate out of which the dower interest arises. The decree should be for the payment annually of the sum ascertained to be the annual value of the dower interest. *Johnson v. Elliott*, 112
2. When the grantee of the husband, after his death, receives the rents, although the widow, upon a bill filed by her to ascertain and settle her claim for dower, is entitled to a decree for her proportion of the rents so received, the decree for what is due should be a general money decree, and it is not a lien upon the estate conveyed by the husband so as to override other charges, or liens created by the grantee. *Ib.* 112

EJECTMENT AND TRESPASS TO TRY TITLE.

1. "The south half of section 11, township 15, range 9, with the exception

EJECTMENT &c.—CONTINUED.

of eighty acres at the west end; and a lot donated for a school house, of land in the Coosa land district," is a sufficient description of the premises sued for, in an action of trespass to try title. *Heifner v. Porter & Simmons*, 470

ENDORSER AND ENDORSEE.

1. An assignee of a note cannot recover of the assignor usurious interest, which in a suit by the assignee against the makers of the note, had been deducted from it, the assignee being a party to the contract, by which the usury was reserved. *Lloyd v. Pace*, 637
 2. An assignor is not responsible to the assignee, for any improper allowance made to the makers of the note, upon their plea, in a suit against them by the assignee. *Ib.* 637
 3. A notice of the dishonor of a note, given to the executor of an endorser, before he has qualified as such, is not such a presentment, as will take the case out of the statute of non-claim. *Branch Bank at Mobile v. Hallett & Walker*, 671
- See Bills of Exchange and Promissory Notes, 11.

ERROR.

1. Where transcripts of records are referred to by a bill of exceptions, but are not certified with the record as a part of it, although attached to the transcript, this court will not consider them, as there is nothing to show they were the same, used at the trial. *Quigley v. Campbell & Cleveland*, 58
2. Where transcripts are so attached, and the counsel for the plaintiff in error states he is surprised by an objection to the record at the argument in this court, and asserts they were the same used at the trial, this will warrant a *certiorari*, although moved for after argument of the cause. *Ib.* 58
3. The objection that the publication by the master, did not sufficiently state the facts and objects of the bill, cannot be raised for the first time in this court. *Cowart v. Harrod & Flournoy*, 265
4. The refusal to quash an attachment, is not revisable on error. *Ellison, et al. v. Mounts*, 472
5. S. having obtained several judgments against W. M. and J. M., transferred them to J. M., authorizing him to "use said notes and judgments, at his own charge and risk, and it is agreed that I am to pay no costs that has, or may accrue." Held, first, that this was not a contract to pay the debt, or answer for the default of another, within the statute of frauds. Second, that J. M. was bound to see that no use was made of the judgments prejudicial to S., and as he could not himself prosecute a writ of error to reverse the judgments, neither could he defend himself upon the ground, that he did not consent to the prosecution of such a writ by his

ERROR—CONTINUED.

- co-defendant, as the agreement was in legal effect a covenant against such an act. *Merrill v. Smith*, 569
6. A *certiorari* to review the judgment of a justice of the peace cannot be regularly sued out after the expiration of three years from the rendition of the judgment; and if sued out after that time, is properly dismissed. *Mason & Chambers v. Moore & Tulane*, 578
7. A judgment of the orphans' court, dismissing a petition for the removal of an administrator, and the appointment of the petitioner in his stead, cannot be reviewed by an appellate court, unless the evidence offered to the court, or the right of the petitioner to the administration, be shown upon the record. *Flora v. Mennice*, 836

ERROR CORAM VOBIS.

1. The judgment upon a writ of error *coram vobis*, is, that the judgment complained of be *affirmed*, or *re-called*, according as it may be for the plaintiff or defendant; and if for the former, then the suit is placed in the same situation as it was when the judgment was rendered. An order to this effect cannot make that interlocutory which would be otherwise final. *Holford v. Alexander*, 280
2. Upon a writ of error *coram vobis*, error cannot be assigned, which contradicts the record. It cannot be assigned, that a corporation against which a judgment had been rendered, had ceased to exist previous to the rendition of the judgment, that fact having been put in issue, and determined in the judgment sought to be reversed. *Ib.* 280
3. Upon such a writ, the authority of the attorney who represented the supposed corporation, cannot be questioned. *Ib.* 280
4. A writ of error *coram vobis*, can only be prosecuted by one who is a party or privy to the record, or injured by the judgment. *Ib.* 280

ESTATES OF DECEASED PERSONS.

1. An agreement between the distributees of an estate, to divide the property and hold it subject to the debts of the deceased, gives to each of the distributees a *lien* upon the share of the other, for the payment of the debts contemplated; but will not subject the property so divided, in the hands of one of the distributees, to sale under a judgment obtained upon a note executed jointly by all the distributees, to a creditor of the estate for a debt due by the deceased. Whether the creditors of the deceased might not have availed themselves of this agreement in equity, or whether the distributees might not have been sued as executors *de son tort—quere*. *Jones' Adm'r v. Swift*, 144
2. An execution cannot be issued against the estate of a deceased debtor, unless one has previously issued on the same judgment in his lifetime, and

ESTATES OF DECEASED PERSONS—CONTINUED.

the fact that there is a plurality of defendants in the judgment, will not change the rule in respect to one who is dead. *Ib.* 145

See Orphans' Court, 11, 12, 13, 14, 15.

ESTATE TAIL AND REMAINDER.

1. A bequest of slaves "to my daughter Mina, during her natural life, and at her death to her heirs, or children," is not an estate tail, and vests a life estate only in the daughter—her children taking vested remainders. *Dunn et al. v. Davis*, 135
2. A reservation in a deed of gift, of a remainder in a slave to a third person, after the termination of a life estate, is within the statute of frauds, and void as against the creditors of the tenant of the life estate, after the lapse of three years, unless the deed is recorded as the statute directs.—*Felder v. Harper*, 612

EVIDENCE.

1. The hand-writing of a justice of the peace to an execution issued by him, may be proved by a third person, without calling the justice himself.—*McCaskle v. Amarine*, 17
2. When the question involved is fraud, the vendee may show that he was advised by a third person to come to this State for the purpose of securing a debt from the vendor, and that he came for that purpose. His purpose in coming is a part of the *res gestae*. *Goodgame v. Cole & Co.* 77
3. Admissions by the vendor, that he was indebted to the vendee, if made at a time previous to contracting the debt [with the attaching creditor, are admissible, it being shown the consideration of the sale was notes due from the vendor to the vendee. *Ib.* 77
4. Admissions made by the vendor at the time of the sale, that he was indebted to the vendee, are admissible as part of the transaction; but as proof of consideration, such admissions are entitled to no weight, if the creditor's debt was existing at the time of the sale. If the evidence creates a suspicion of the fairness of the transaction, it is incumbent on the vendee to prove the payment of an adequate consideration. *Ib.* 77
5. Declarations made by a vendor remaining in possession of slaves, after the period when, by the ordinary course of trade, they should have passed to the possession of the vendee, are admissible as evidence on the ground, that from this circumstance a fraudulent combination between them might be inferred. *Ib.* 77
6. An assignment of a certificate not under seal, does not pass the legal title, and is not proper evidence in an ejectment suit by a sheriff's vendee. The improper admission of merely cumulative evidence, is sufficient to reverse a judgment. *Falkner v. Jones and Leith*, 165

EVIDENCE—CONTINUED.

7. Where a condition is annexed to a bill of sale, it is not competent to show by parol evidence, that another and different condition was agreed to by the parties. *Adams v. Garrett, et al.* 229
8. The declarations of the payee of a note, through whom the plaintiff derives title as indorsee, are not evidence to charge the maker, although his admissions made on a previous day in discharge of the maker, had been given in evidence by the latter—the later admissions not being made in the same conversation as those first spoken of. *Perry v. Graves,* 246
9. Where a witness states, that according to his best recollection, written evidence of an award exists, it is sufficient, in the absence of opposing proof, to exclude parol testimony of the award. *Scarborough v. Reynolds,* 252
10. A witness cannot be allowed to state that he saw a credit of \$400 entered upon a note without producing the note, unless, perhaps, the note has been fully paid off, so as to warrant the inference that it has been destroyed, or unless he could swear to the payment from his own knowledge. *Ib.* 252
11. An agreement by counsel in one suit, of the existence of a fact, is not proof of the fact, in another suit, with which the former has no connection. *Heirs of Holman, et al. v. Bank of Norfolk,* 370
12. When the object is not to establish the facts stated by a witness, but to impeach his credit, a deposition made by him in another suit, and between other parties, is evidence to contradict him. The rule of law established in the Queen's case, does not apply. *Ib.* 370
13. Upon a bill filed by B, or those claiming under him, against the heirs of H., for a specific performance of this contract, B having taken possession under it, the instrument is *prima facie* evidence under the statute, that it was made upon sufficient consideration. *Ib.* 370
14. Proof by old residents of Mobile, who had resided there before, and since the execution of the deed, that they never knew or heard of such persons as the witnesses to the deed in this State, is *prima facie* sufficient, to prove non-residence, and let in the secondary evidence. *Ib.* 370
15. The fact, that J. M., before entering into the contract, was advised by a lawyer, that it would not subject him to the costs of the judgments, was not admissible. *Merrill v. Smith,* 569
16. Upon a trial of right of property, levied on by attachment, the claimant may prove, that the defendant in attachment, at the time he purchased the slaves levied on, declared that he paid for them with the land of the *cestui que trust*, (in whose behalf they were claimed,) and purchased the slaves for their use, the *res gestae*, being the sale and purchase, and not the possession of the slaves; such testimony would be no proof of *consideration*, if the attaching creditor's debt then existed. *Berry, use, &c. v. Hardman,* 604

EVIDENCE—CONTINUED.

17. Whether a witness whose opinions are offered in evidence as an expert in any art or science, is competent to testify, is to be determined by the court, either by examining the witness himself, or from the testimony of others. *Tullis v. Kidd*, 648
18. One who is not engaged in the practice of physic, may nevertheless be competent to testify, if he shows that he had studied the science of medicine, and felt competent to express a medical opinion upon a particular disease. The fact that he was not a practising physician would go to his credit. *Ib.* 648
19. After a witness has been admitted to testify as an expert, evidence cannot be given to the jury of the opinions of other experts in the same science, that the witness was qualified to draw correct conclusions, in the science on which he had been examined; though such testimony would have been properly offered to the court, to show the competency of the witness. *Ib.* 648
20. A written contract, by which one bound himself to "re-sell" certain slaves, which he had purchased, and for which he had received a bill of sale, cannot be contradicted by parol evidence, unless the contract was obtained by fraud, or entered into by mistake, or surprise. *McKinstry v. Conly*, 678
21. An allegation in a bill, that by the term "re-sell," the parties meant *re-convey*, is not sufficient to authorize the introduction of parol proof, contradicting the written instrument. *Ib.* 678
22. A letter written by one professing to be a commissioner in the general land office, is not, without further proof, admissible as an instrument of evidence. *Brown v. Chambers, et al.* 698
12. Parol evidence is admissible to show, that a particular bill of exchange was intended to be secured by a deed of trust, though generally, or improperly described in the deed. *Posey and Coffee, Ex'rs, v The Decatur Bank*, 802
24. An inquisition, had by order of the orphans' court, to ascertain whether an individual is not *non compos mentis*, of the pendency of which he has no notice, is not evidence for any purpose, to affect the right of the individual so found to be insane, or any one claiming through him. *McCurry v. Hooper*, 823
25. Insanity, is shown by the proof of acts, declarations, and conduct, inconsistent with the character, and previous habits of the party. The mere opinions of witnesses, of the sanity, or insanity, of a person, are not competent testimony, unless they are medical men, acquainted with the facts. *Ib.* 823
26. H. sold P. two slaves, and received in payment a sum of money in cash, and the bond of P. for \$400, and promised P. that this bond should not be applied in any other way, than to the extinguishment of a mortgage,

EVIDENCE—CONTINUED.

which one B. held on the slaves. Held, that this testimony did not contradict the bond, the written evidence of the contract—Nor was it irrelevant, as the question between the plaintiff, and defendant, was whether the latter assented to the delivery of the bond, by H. to the former. *Huntington v. Adams*, 834

See Criminal Cases and Proceedings in, 13, 14, 15, 16.

See Executors and Administrators, 4, 5, 6.

See Pleading, 7.

EXCEPTIONS, BILL OF.

1. Where transcripts of records are referred to by a bill of exceptions, but are not certified with the record as a part of it, although attached to the transcript, this court will not consider them, as there is nothing to show they were the same, used at the trial. *Quigley v. Campbell & Cleveland*, 58
2. When the bill of exceptions in a criminal case does not state evidence before the jury, to warrant the particular instructions asked and refused, the legal presumption of the omission is, that there was no such evidence. *Pierson v. The State*. 149

EXECUTORS AND ADMINISTRATORS AND THEIR SURETIES.

1. Under a special contract to sell slaves to one upon the payment of a sum certain at a specified day, the title vests in the party to whom they are to be sold, by the tender of the money, and when the tender is made by an administrator and refused, yet the administrator, by the act of tender and refusal becomes the bailee of the money, and as such may be sued by the executor of the other party, where he has successfully sustained an action of detinue, on the ground that the title vested in the estate by the act of tender. *McLeod v. Powe and Smith*, 9
2. When a husband permits the wife to place the proceeds of the hire of a slave, out at loan for her own use, which after his death, was paid to her by the borrower, the representative of the husband cannot recover it from her. But the husband could not make such a gift to the prejudice of creditors, either during his life, or to take effect after his death. *Purveyor v. Puryear*, 13
3. When the avails of an action prosecuted by an administrator, would, if successful, be assets of the estate he represents—if unsuccessful, the estate must be charged with the costs; and if a judgment for costs is rendered against him by the court below *de bonis propriis*, it will be here rendered *de bonis intestatis*. *Hutchinson, adm'r, v. Gamble*, 36
4. Where a judgment is rendered against the plaintiff for a specific sum in a suit commenced by him as administrator, without directing the recovery *de bonis testatoris*, its legal effect, until demanded, is *de bonis propriis*, and

EXECUTORS, &c.—CONTINUED.

- as such it cannot be given in evidence under a declaration describing it as *de bonis testatoris*. *Quigley v. Campbell & Cleveland*, 58
5. The judgment obtained against the plaintiff in a suit by him as administrator under our statute of set-off, even when properly entered *de bonis testatoris*, is no evidence of assets in a suit upon it for a *devastavit*. *Ib.* 58
 6. In such a suit on such a judgment, the record of the settlement by the administrator, although of a part of the administration, is admissible evidence, as it, with the vouchers, may show the amount of the debts against the estate, the periods when paid, and the extent to which the party is liable for the alleged *devastavit*. *Ib.* 58
 7. An administrator cannot sue upon a note, an asset of the estate, which he has taken payable to himself as administrator, after his removal from office, although no successor has been appointed. *Dunham v. Grant*. 105
 8. No title passes to the purchaser, by a *private* sale of the property of an estate by the administrator, although the administrator is estopped by his own act from recovering it, by an action in his own name. Nor can the administrator coerce payment of the purchase money, as no right can be derived from an unlawful act; and the contract being void in its inception, the defence may be made, without placing the other party *in statu quo*, by a return of the property. *Fambro v. Gantt*, 298
 9. A penal bond, made by the widow, jointly with the administrator, to make the purchaser a good title to the land, estops her from asserting title against him, under the title derived from the patent from the government. *Johnson and wife, et al. v. Collins*, 322
 10. A payment by an administrator of an insolvent estate, to a creditor, he binding himself "to hold the administrator harmless, in case said estate on settlement, does not pay enough to cover the above amount," is not an absolute payment, or an admission that the claim is just, but if the claim is rejected for want of presentation in time to the administrator, he may recover back the money so paid. *Gorman v. Nairne*, 338
 11. A sole legatee has no right to the possession of the personal estate, until the personal representative has assented to it, and if in possession, it may be recovered by the personal representative when appointed. *Upchurch v. Norsworthy*, 532
 12. An administrator has no right to the proceeds of the crops made upon the land of his intestate, with the slaves of the estate, previous to the grant of administration. Whether he could not recover the value of the use of the slaves, and other personal property, *quere*. *Ib.* 532
 13. An administrator *prima facie* is chargeable with interest under the statute upon all receipts until disbursement, and must discharge himself by oath. *King, adm'r, v. Cabiness' creditors*, 598
 14. A judgment cannot be rendered against an administrator in detinue

EXECUTORS, &c.—CONTINUED.

- where the suit has been revived against him, unless the thing sued for was in the hands of his intestate at the time of the suit brought, or has since come to the possession of the personal representative, and held by him as assets of the estate. *Easly, adm'r, &c. v. Boyd*, 684
15. The absence of an administrator from the State, will not prevent the bar of the statute of non-claim, after it has commenced running. Whether the removal of the administrator from the State, would not justify the revocation of his authority, *quere*. *Branch Bank at Decatur v. Donelson, adm'r*, 741
16. A promise by an administrator, after the expiration of eighteen months after the grant of letters of administration, to pay a debt which had not been presented to him, will not take it out of the statute of non-claim.—*Branch Bank at Decatur v. Hawkins, adm'r*, 755
17. Money paid by mistake, by the administrator of an estate, to another administrator, may be recovered back, if demanded before paid out in the distribution of the assets of the estate. *Wilson v. Sergeant*, 778
18. An administrator *ad colligendum*, is the mere agent, or officer of the court, and may be removed at any time, and an administrator in chief appointed. *Flora v. Mennice*, 836

EXECUTION, WRIT OF.

1. The possession of land under a claim of right, is *prima facie* such an interest as is subject to levy and sale, although the possession may not have continued such a length of time as to bar the right of entry. *McCaskle v. Amarine*, 17
2. When a *lien* has attached on personal property, by the delivery of a *fiery facias* to the sheriff, which, during the continuance of the *lien*, is removed by the defendant in execution to another State, and sold, it may be levied on and sold, by an *alias* execution, if brought back again to this State.—*McMahan v. Green*, 71
3. *Quere*, would not the foreign purchaser acquire a good title by a purchase at a judicial sale, or would not the remedy be lost, if the property had remained long enough in the foreign country, for the statute of limitations to bar an action for its recovery. *Ib.* 71
4. A garnishee against whom a regular judgment has been rendered, may discharge it by payment, without waiting until he is coerced by execution. *Mills & Co. v. Stewart*, 90
5. An execution cannot be issued against the estate of a deceased debtor, unless one has previously issued on the same judgment in his lifetime, and the fact that there is a plurality of defendants in the judgment, will not change the rule in respect to one who is dead. *Jones Adm'r v. Swift*, 145
6. Executions issued by justices of the peace, from one county to another, may be certified, either by the clerk of the county to which it is sent, or

EXECUTION, WRIT OF—CONTINUED.

- by any justice of that county, who is satisfied of the genuineness of the signature of the justice issuing it. *Jordan v. Mead*, 247
7. It is not indispensable to the regularity of an execution, issued on a forthcoming bond, that it should affirm on its face, that the bond was forfeited. *Sheppard v. Melloy, et al.* 561
8. A discrepancy between the first and second executions, as to the amount of costs, furnishes no ground for quashing the latter, *Ib.* 561
9. A difference in the amount of damages, which a first and second execution, affirm the plaintiff recovered, is such a clerical misprision, as may be amended in the primary court; and when the record, which shows the variance, and upon which the motion to quash is founded, furnishes the only proper *data* for the correction of the error, it is the duty of the court, *mero motu*, to direct the amendment, and overrule the motion to quash. *Ib.* 561
10. An execution may include defendants to the judgment, who did not unite in a forthcoming bond, as well as the obligors in the bond, if forfeited. If the execution does not on its face, or by the indorsement of the clerk, show who were the obligors in the bond, it may be amended by the judgment and forthcoming bond. *Ib.* 561
11. The possessory interest of a grantor in a deed of trust, which may be sold under execution, is a certain, ascertained possession, for a definite period. *Hawkins v. May*, 673
12. The interest of one in possession of personal property, may be sold under execution at law, though the legal title is outstanding in a trustee.—*Clarke & Co. v. Windham*, 798
13. An execution issuing from the orphans' court, for the collection of money, should be made returnable to the regular *semi-annual* term of the county court proper, if there are fifteen days between the commencement of the term, and the teste of the writ; if not, then to the next succeeding term of the county court. *Graham and Abercrombie v. Chandler*, 829
14. Such an execution, when issued, has the same attributes as an execution issued on a judgment at common law, must be executed in the same mode, and may be enforced in the same manner; consequently, a motion may be made against the sheriff for failing to make the money. *Ib.* 829
- See Marriage Settlements, 5.

EXECUTION, PROPERTY EXEMPT FROM.

1. If an officer having a *feri facias*, attempts to levy it on articles exempt by law from levy, and sale by execution, after being warned of the fact, the owner may employ as much force, as is necessary to prevent the levy, but if he employs more force than is necessary, he becomes a trespasser. *The State v. Johnson*, 840

EXECUTORY DEVISE.

1. A bequest to the wife of real and personal property, "during her natural life, and at her decease to be left to my son, A. S.P." vests immediately in the son, as an executory devise. *Farley v. Gilmer, et al.* 141

EXPERTS.

See Witness, 7, 8, 9.

FORCIBLE ENTRY AND DETAINER.

See Witness, 1.

FORTHCOMING BOND.

1. Irregularities in a delivery bond given by the claimant of property levied on, cannot be examined in the first instance in this court. If the bond is so defective as not to warrant the plaintiff in suing out execution, the proper course is to apply to the circuit court, or to a circuit judge to supersede it. *Del Barco v. Branch Bank at Mobile,* 238
2. It is not indispensable to the regularity of an execution, issued on a forthcoming bond, that it should affirm on its face, that the bond was forfeited. *Sheppard v. Melloy, et al.* 561
3. An execution may include defendants to the judgment, who did not unite in a forthcoming bond, as well as the obligors in the bond, if forfeited. If the execution does not on its face, or by the indorsement of the clerk, show who were the obligors in the bond, it may be amended by the judgment and forthcoming bond. *Ib.* 561
4. One of several defendants may replevy property levied on, although his co-defendants do not unite with him in the bond. Whether, after a forfeiture, the other defendants could replevy, when their property was levied on, upon an execution on the forfeited bond, *quere.* *Ib.* 561

FRAUD.

1. The possession of a fraudulent vendee cannot be deemed adverse, as against creditors and purchasers from the vendor, where the subsequent purchase was made under judicial process; and the possession of the tenants of the fraudulent vendee, must be considered as his possession.—*McCaskle v. Amarine,* 18
2. The mere fact that the entire consideration recited in a deed has not been paid, or that it is not a full equivalent for the property conveyed, does not *per se* make the deed void, though it may cast suspicion over the transaction, and authorize a verdict against it. *Ib.* 18
3. A court of chancery has jurisdiction to set aside a deed, conveying either land or slaves fraudulently obtained. *Rumph v. Abercrombie,* 64
4. A contract for the sale of slaves at an inadequate price, obtained by an

FRAUD—CONTINUED.

- abuse of confidence, reposed in the vendor, by the vendee, will be set aside in equity, especially in a case, where the vendor was in a weak condition of body, and in a gloomy, unsettled state of mind, so as to be peculiarly liable to imposition. *Ib.* 64
5. When the question involved is fraud, the vendee may show that he was advised by a third person to come to this State for the purpose of securing a debt from the vendor, and that he came for that purpose. His purpose in coming is a part of the *res gestae*. *Goodgame v. Cole & Co.* 77
6. Declarations made by a vendor remaining in possession of slaves, after the period when, by the ordinary course of trade, they should have passed to the possession of the vendee, are admissible as evidence on the ground, that from this circumstance a fraudulent combination between them might be inferred. *Ib.* 77
7. An assignment by an insolvent, conveying all his property to trustees, and giving preference to certain creditors, and directing first, the payment of certain preferred creditors, "the surplus, if any, to be appropriated to the other creditors rateably, who shall within four months execute a release of their claims, and if there be any surplus, after fulfilling all the trusts aforesaid, the same shall be paid over to the said R. L. W." is such a stipulation for the benefit of the debtor, as renders the deed fraudulent and void.—*Grimshaw & Brown v. Walker,* 101
8. Where there has been a public sale of personal property, the purchaser may leave it with the former owner, upon a contract, or from motives of benevolence, and if the act is *bona fide*, it will not be liable to the debts of the former owner. *Simerson v. The Branch Bank at Decatur,* 205
9. An intention to defraud the public generally, by contracting debts, and circulating paper as money, upon the faith of real estate conveyed for the payment of such debts, and the redemption of such notes, will not render the deed, by which such real estate is conveyed, void, under the statute of frauds, unless there was an intention on the part of the grantor, to defraud, hinder, or delay, his own creditors. *Griffin v. Doe ex dem. Stoddard and Murphy,* 783
- See Mortgagor and Mortgagee, 1.
- See Sales, 3.

FRAUDS, STATUTE OF.

1. When property is conveyed absolutely, to a married woman, by a stranger, the statute of frauds has no application, in a contest between the wife and the creditors of the husband; it is therefore unimportant, whether the instrument is, or is not recorded. *Newman v. James & Newman,* 29

FRAUDS, STATUTE OF—CONTINUED.

2. A covenant, by which H bound himself to give B a quit-claim deed to one half a tract of land, (which is described,) "to be executed within two years from the date," is not a contract for the sale of land, within the meaning of the statute of frauds, but is an unconditional promise to convey, by a time stipulated, and is *prima facie* evidence, that the consideration had been paid, or performed. *Heirs of Holman, et al. v. Bank of Norfolk*, 370
3. Although a slave has been lent, and continued in possession of the borrower for more than three years, without the registration required by the statute of frauds, if the owner resumes the possession, before any creditor of the borrower has acquired a *lien* upon it, it cannot be afterwards made subject to the debts of the borrower. *Maull v. Hays*, 499
4. S. having obtained several judgments against W. M. and J. M., transferred them to J. M., authorizing him to "use said notes and judgments, at his own charge and risk, and it is agreed that I am to pay no costs that has, or may accrue." Held, first, that this was not a contract to pay the debt, or answer for the default of another, within the statute of frauds. Second, that J. M. was bound to see that no use was made of the judgments prejudicial to S., and as he could not himself prosecute a writ of error to reverse the judgments, neither could he defend himself upon the ground, that he did not consent to the prosecution of such a writ by his co-defendant, as the agreement was in legal effect a covenant against such an act. *Merrill v. Smith*, 569
5. An intention to defraud the public generally, by contracting debts, and circulating paper as money, upon the faith of real estate conveyed for the payment of such debts, and the redemption of such notes, will not render the deed by which such real estate is conveyed, void, under the statute of frauds, unless there was an intention on the part of the grantor, to defraud, hinder, or delay his own creditors. *Griffin v. Doe ex dem. Stoddard and Murphy*, 783

GAMING.

1. The office of a physician, where he exhibited his medicines, received professional calls at all times, and being unmarried, ate, and slept, is not a public place, within the statute against gaming, the playing being at night, with closed doors, and a few friends present by invitation. *Clarke v. The State*, 492

GARNISHMENT AND GARNISHEE.

1. In an issue between the transferee of a debt admitted as due to the debtor and the attaching creditor, the court may require the transferee to aver the validity of the transfer, and it is not error to refuse to compel the cre-

GARNISHMENT AND GARNISHEE—CONTINUED.

- ditor to aver that the debt is subject to his process. *Scott, Slough & Co. v. Stallsworth*, 25
2. Under the trial of such an issue, the debtor, under the act of 1845, is not a competent witness. *Ib.* 25
3. The answer of the garnishee, and the papers in the cause, cannot be looked to as evidence on the trial of this issue. *Ib.* 25
4. A plea, alledging that the defendant had been garnisheed in a court of the State of Louisiana, and a judgment rendered against him on his answer, condemning the debt in favor of a creditor of the plaintiff, setting out the proceedings fully, and alledging that they were conducted according to the law of Louisiana, and that he had paid, and satisfied the judgment so rendered, is good. It is not necessary in such a plea to alledge, *in totidem verbis*, that the defendant had no notice of the transfer of the note, when he answered the garnishment. *Mills & Co. v. Stewart*, 90
5. A negotiable note, not indorsed before its maturity, may be the subject of an attachment, or garnishment, at the suit of the creditors of the payee, so long as he remains its proprietor, or until the maker has notice of the transfer, if indorsed when past due. *Ib.* 90
6. A garnishee against whom a regular judgment has been rendered, may discharge it by payment, without waiting until he is coerced by execution. *Ib.* 90
7. Equity has jurisdiction to set aside the fraudulent transfer of a debt reduced to judgment, although the party may also be entitled to a legal remedy by a garnishee process, against the fraudulent transferee. *Sheppard, et al. v. Iverson*, 97
8. When a garnishee answers, and upon special interrogatories referring to the answer, answers again more fully, and is discharged upon the last answer, both answers are to be considered as part of the record. *Wicks v. The Branch Bank at Mobile*, 594
9. When a garnishee answers, admitting an indebtedness to the defendant, but also stating, that he has been informed, the defendant as a bankrupt has given in the debt in his schedule, and that it has been sold, and purchased under the decree in bankruptcy, by C. A. M., no judgment can be rendered against the garnishee, on the answer, but an issue should be tendered by the plaintiff. *Quere*, When the garnishee answers, that he holds funds of the defendant, to which the latter is entitled, for services rendered the State, in a public capacity, can any judgment be rendered? *Ib.* 594
10. The answer of a garnishee must be contested at the term at which it is made; and if an issue be subsequently tendered, he may object to joining in it, unless he has expressly, or by implication, waived his right to a discharge. *McDaniel v. Reed*, 615
- See Vendor and Vendee, 11.

GIFT.

1. When a gift of slaves is made by deed, the delivery of the deed is sufficient, without a delivery of the property. *Newman v. James & Newman*, 29
2. A reservation in a deed of gift, of a remainder in a slave to a third person, after the termination of a life estate, is within the statute of frauds, and void as against the creditors of the tenant of the life estate, after the lapse of three years, unless the deed is recorded as the statute directs. *Felder v. Harper*, 612
3. A consideration of \$10, expressed in a deed of gift of two slaves, is on its face merely nominal. *Ib.* 612

GUARDIAN AND WARD.

1. A guardian who fails to make annual settlements of his accounts, is liable for interest on the funds in hand; but is not liable to be charged compound interest, unless he is guilty of such gross neglect, as is evidence of fraud. The mere omission to make annual settlements, is not evidence of fraud, so as to authorize the charge of compound interest. *Bryant v. Craig*, 354
2. A guardian may apply to the orphans' court for authority to invest the funds of his ward, and if lost without his fault after such investment, he will not be personally responsible. *Ib.* 355
3. In settling the accounts of a guardian, the court should charge the guardian with interest on all money of the ward in his hands, from the time of its receipt, and allow him interest on all disbursements from the time they were made, the interest due from the guardian to extinguish *pro tanto*, or in full as the case may be, the expenditure of the ward. *Ib.* 355

HUSBAND AND WIFE.

1. When a husband permits the wife to place the proceeds of the hire of a slave, out at loan for her own use, which after his death, was paid to her by the borrower, the representative of the husband cannot recover it from her. But the husband could not make such a gift to the prejudice of creditors, either during his life, or to take effect after his death. *Puryear v. Puryear*, 13
2. A conveyance of slaves by deed, to a married woman, "to her and her heirs, to have and to hold the same, to and for her use, benefit, and right, and of the heirs aforesaid, without let, hindrance or molestation, whatever," is a conveyance of the property to her sole and separate use. *Newman v. James & Newman*, 29
3. When property is conveyed absolutely, to a married woman, by a stranger, the statute of frauds has no application, in a contest between the wife

HUSBAND AND WIFE—CONTINUED.

- and the creditors of the husband ; it is therefore unimportant, whether the instrument is, or is not recorded. *Ib.* 29
4. When the grantee of the husband, after his death, receives the rents, although the widow, upon a bill filed by her to ascertain and settle her claim for dower, is entitled to a decree for her proportion of the rents so received, the decree for what is due should be a general money decree, and it is not a lien upon the estate conveyed by the husband so as to override other charges, or liens created by the grantee. *Johnson v. Elliott*, 112
 5. Upon a suit by husband and wife, on a note given to them jointly, for a debt created with the defendants, by the dealing of the wife with the consent of the husband, the defendants may set off an account, not included in the note, created in the same course of dealing. *Case and Eslava v. P. & C. Byrne*, 115
 6. A bill in equity, by which a *feme covert* asserts her marital rights against her husband ; or seeks to have settled to her separate use, property, which he has purchased with her separate funds, is not such a proceeding *in rem*, as to make the decree therein rendered, conclusive on all persons ; but is binding only on the parties to it. *The Branch Bank at Montgomery v. Hodges*, 118
 7. A trustee of a married woman, to preserve her separate estate, is not responsible for medical services rendered to slaves, constituting her separate estate, they not being in his possession, or the services rendered at his request, and he never having promised to pay the value of the services. *Hodges v. Hoole*, 177
 8. A bequest to a married woman, "to go to the support of herself and children ;" also, "I lend to my daughter, C. D., wife of G. D., the land whereon they now live, with all the household and kitchen furniture which they have in possession ; also, one negro woman Winney, one negro girl Ailsie, and one negro, Langley, with them and their increase, to enable her to support, school, and clothe her children, during her natural life, and after her death to be equally divided between her children, to them and their heirs forever," does not give the husband such an estate in the property, as can be subjected to sale at law, for the payment of his debts. *Jasper & Maclin v. Howard, Trustee*, 652
 9. The dying declaration of a husband, is competent evidence against the wife, to show her guilt. *Moore v. The State*, 764
 10. After the coverture has ceased, a woman may be proceeded against at law, for a debt which she owed previous to the marriage. *Clarke & Co. v. Windham*, 798
- See Marriage Settlements, 5, 6.

INDICTMENT.

1. It is not necessary that an indictment for an offence created by statute,

INDICTMENT—CONTINUED.

- should pursue the very words of the act. The act inflicting a penalty on persons "who buy, sell, or receive *from* any slave, any commodity," &c. is violated, by selling to a slave without the consent of the master. *Worrell v. The State*, 732
2. Two indictments, one for resisting legal process, and the other for an assault, cannot be supported for the same offence. The decisive test, is, whether the same testimony will support both charges. *The State v. Johnson*, 840

INFANT AND PROCHEIN AMI.

1. A trial of right of property may be prosecuted in the name of an infant, by a *prochein ami*, who may execute the bond, and if necessary make the affidavit required by the statute. *Strode, et als. v. Clark*, 621

INSANITY.

1. An inquisition, had by order of the orphans' court, to ascertain whether an individual is not *non compos mentis*, of the pendency of which he has no notice, is not evidence for any purpose, to affect the right of the individual so found to be insane, or any one claiming through him. *McCurry v. Hooper*, 823
2. Insanity, is shown by the proof of acts, declarations, and conduct, inconsistent with the character, and previous habits of the party. The mere opinions of witnesses, of the sanity, or insanity, of a person, are not competent testimony, unless they are medical men, acquainted with the facts. *Ib.* 823

INTENDMENT AND LEGAL PRESUMPTION.

1. When a bill of exchange is drawn in this State, payable "at the Merchants' Bank in the city of New York," this court will take judicial notice that the *city of New York*, is the commercial city of that name, beyond the limits of this State. *Dickinson v. The Branch Bank at Mobile*, 54
2. When the record does not show that the plaintiff to whom a claim is decreed, is not the proprietor, the presumption will arise, the necessary proof of ownership was made. *Boggs' adm'r v. Branch Bank at Mobile*, 494
3. In a suit by the bank, against the cashier on his bond, to recover damages, because he had failed to protest a bill of exchange, left with the bank for collection, it was proved that it was the duty of the cashier to attend to this department. It was also proved, that a resolution was introduced by a director, and passed, requiring the cashier so to arrange the duties of the various officers of the bank, as to give to Mr. Ball, (an officer of the bank,) the necessary assistance in his department. Under this resolution, a written memorandum of the various duties of each officer was drawn up and signed by all the officers, except two, by which Mr. Saunders, the second

INTENDMENT AND LEGAL PRESUMPTION—CONTINUED.

book-keeper, was charged with the duty of attending to the collecting register, and proceeded to discharge, and did discharge, that duty, until after the default complained of. This memorandum, agreed on by the officers of the bank, was by *Comegys*, laid on the table of the board of directors, when in session, but it was not proved that it was read, or acted on by the board: Held, that it was a reasonable inference, that the board of directors assented to, and approved of this arrangement of the officers of the bank—that as they did not dissent from it, they must be considered as acquiescing in the arrangement so made. *Bank of the State of Alabama v. Comegys, et als.* 772

INTEREST.

1. When a bill is drawn within this State, payable at a place beyond its limits, interest, and damages cannot be recovered of the acceptor, upon its dishonor, without proving the law of the place of payment, giving such damages, and interest. *Dickinson v. The Branch Bank at Mobile,* 54
2. It is no objection that interest, and damages for non-payment, are included in the same entry of judgment, without specifying the amount of each, separately. *Ib.* 54
3. A guardian who fails to make annual settlements of his accounts, is liable for interest on the funds in hand; but is not liable to be charged compound interest, unless he is guilty of such gross neglect, as is evidence of fraud. The mere omission to make annual settlements, is not evidence of fraud, so as to authorize the charge of compound interest. *Bryant v. Craig,* 354
4. In settling the accounts of a guardian, the court should charge the guardian with interest on all money of the ward in his hands, from the time of its receipt, and allow him interest on all disbursements from the time they were made, the interest due from the guardian to extinguish *pro tanto*, or in full as the case may be, the expenditure of the ward. *Ib.* 355
5. When lands and slaves mortgaged to several creditors, by agreement between the creditors and the mortgagor, are to be sold, and the proceeds paid in definite sums to each creditor, with preference to each in the order he is named in the agreement, they will not be entitled to interest when the agreement is enforced against them on the cross bill of the debtor, and they stand in the same condition to each other as to default in carrying out the agreement. *Pinkard v. Ingersoll, et al.* 441
6. An administrator *prima facie* is chargeable with interest under the statute upon all receipts until disbursement, and must discharge himself by oath. *King, adm'r, v. Cabiness' creditors,* 598

JUDGMENT AND DECREE.

1. Where a judgment is rendered against the plaintiff for a specific sum in a suit commenced by him as administrator, without directing the recovery

JUDGMENT AND DECREE—CONTINUED.

- be bonis testatoris*, its legal effect, until demanded, is *de bonis propriis*, and as such it cannot be given in evidence under a declaration describing it as *de bonis testatoris*. *Quigley v. Campbell & Cleveland*, 58
2. The judgment obtained against the plaintiff in a suit by him as administrator under our statute of set-off, even when properly entered *de bonis testatoris*, is no evidence of assets in a suit upon it for a *devastavit*. *Ib.* 58
 3. In such a suit on such a judgment, the record of the settlement by the administrator, although of a part of the administration, is admissible evidence, as it, with the vouchers, may show the amount of the debts against the estate, the periods when paid, and the extent to which the party is liable for the alledged *devastavit*. *Ib.* 58
 4. A decree may be made against a resident defendant, who fails or refuses to answer, after service of process. *Cowart v. Harrod & Flournoy*, 265
 5. A decree against a non-resident, may be rendered, with a condition, that the complainant shall not enforce it, until he executes the refunding bond required by the statute. *Ib.* 265
 6. A judgment against a sheriff, on a rule by a judgment creditor for failing to make money, is no further binding on a junior judgment creditor, not a party to it, than that such a judgment was rendered, and for what amount. If the junior creditor can establish, that the property of the defendant in execution, would have yielded a sum, in addition to the amount found by the previous jury, for this amount, abandoned from neglect, or lost through the ignorance of the senior judgment creditor, he is entitled to a judgment. *Anderson & Adams v. Bright & Ledyard*, 478
 7. A judgment in favor of one partner, in a suit in which he alone is a party, is no bar or evidence of payment in another suit by the same plaintiff, against another partner, on the same cause of action. Whether it would not have been competent to have set up, and sustained by proof, the set-off, or payment, which enabled the other partner successfully to gainsay the plaintiff's action, even if such payment, or set-off, were made by, or were due to such partner in his individual capacity, *quere*. *McLelland v. Ridgeway*, 482
 8. S. having obtained several judgments against W. M. and J. M., transferred them to J. M., authorizing him to "use said notes and judgments, at his own charge and risk, and it is agreed that I am to pay no costs that has, or may accrue." Held, first, that this was not a contract to pay the debt, or answer for the default of another, within the statute of frauds. Second, that J. M. was bound to see that no use was made of the judgments prejudicial to S., and as he could not himself prosecute a writ of error to reverse the judgments, neither could he defend himself upon the ground, that he did not consent to the prosecution of such a writ by his co-defendant, as the agreement was in legal effect a covenant against such an act. *Merrill v. Smith*, 569

JUDGMENT AND DECREE—CONTINUED.

See Executors and Administrators, 4, 5, 6.

See Quo Warranto, 1.

JURY AND JUROR.

1. Where the jury, upon an indictment for assault and battery with intent to commit murder, and for an ordinary assault, return a general verdict of guilty, or a verdict finding one defendant guilty of an assault with *intent to kill*, and the other, guilty of an assault and battery, without assessing a fine, it is no error for the court to send the jury out, with instructions to return a final verdict. *Hughes v. The State*, 458

JUSTICE OF THE PEACE.

1. A justice of the peace who takes insufficient surety upon an appeal bond, is not individually responsible, unless it be shown that he acted from corrupt, or impure motives. *Lester v. The Governor*, 624
2. Whether the sureties of a justice upon his official bond are bound for the official malversation of their principal, and whether the bond was not intended as a security for the performance of his ministerial duties only, *quere. Ib.* 624

LANDLORD AND TENANT.

1. When a suit is brought against several persons, as tenants of the same lands, and A is "admitted to defend as landlord, for each, and all of said original defendants," and pleads not guilty, it is in effect the same, as if he had instituted the suit himself, and he cannot therefore object that a judgment is rendered generally for the damages, without ascertaining the value of the rent of each tenant. *Quere*, can a joint action be maintained, if objected to, against several persons occupying separate parcels of the land. *McCaskle v. Amarine*, 18
2. Rent in arrear, or falling due, is merely a debt due from the tenant to the landlord, for the payment of which he has, under the statute, a *lien* on the crop grown on the premises, and when it is removed, either by the tenant or a stranger, he cannot maintain trespass for its recovery. *Thompson v Spinks*, 155
3. Where a tenant delivered certain cotton to one D; with instructions to take it to Mobile and sell it, and pay the landlord the rent of the land, but of which arrangement the landlord was ignorant; after which, the defendant, as sheriff, levied upon and sold it, as the property of the tenant: Held, that though D being, as bailee of the cotton, invested with the right of possession, might have maintained trespass for an injury to it, the landlord having neither the possession, or the right to it, could not. *Ib.* 155
4. Under the statute which allows landlords to defend ejectment suits, it is not necessary the technical relation of landlord and tenant should exist.

LANDLORD AND TENANT—CONTINUED.

- The act extends to all persons claiming title consistently with the possession of the occupier. *Falkner v. Jones and Leith*, 165
5. Any one having the title under which the tenant in possession holds, and who is entitled to an immediate right of entry against him, must be allowed to defend as his landlord, although the ejectment suit is by the purchaser of the tenant's title at a sheriff's sale. *Ib.* 165
6. An action for money had and received, cannot be maintained by a landlord, against a purchaser from the tenant, of the crop grown on the rented land, but he may maintain attachment, under the statute, if the purchaser had knowledge of the *lien* of the landlord. Whether he might not also maintain an action on the case under such circumstances, *quer.* *Dulany v. Dickerson*, 601

LEASES AND RENTS.

1. When the grantee of the husband, after his death, receives the rents, although the widow, upon a bill filed by her to ascertain and settle her claim for dower, is entitled to a decree for her proportion of the rents so received, the decree for what is due should be a general money decree, and it is not a *lien* upon the estate conveyed by the husband so as to override other charges, or liens created by the grantee. *Johnson v. Elliott*, 112
2. Rent in arrear, or falling due, is merely a debt due from the tenant to the landlord, for the payment of which he has, under the statute, a *lien* on the crop grown on the premises, and when it is removed, either by the tenant or a stranger, he cannot maintain trespass for its recovery. *Thompson v. Spinks*, 155
3. The act of 30th January, 1840, for the collection of rents in the city of Mobile, does not differ from the general attachment law, as it, in effect merely authorizes a suit to be commenced by attachment, for the recovery of rent in the city of Mobile, and is to be governed by the same rules as other suits commenced by attachment. *North v. Eslava*, 240

LEGACY.

1. A bequest of slaves "to my daughter Mina, during her natural life, and at her death to her heirs or children," is not an estate tail, and vests a life estate only in the daughter—her children taking vested remainders. *Dunn et al. v. Davis*, 135
2. A bequest to the wife of real and personal property, "during her natural life, and at her decease to be left to my son, A. S. P." vests immediately in the son, as an executory devise. *Farley v. Gilmer, et al.* 141
3. A sole legatee has no right to the possession of the personal estate, until the personal representative has assented to it, and if in possession, it may be recovered by the personal representative when appointed. *Upchurch v. Norsworthy*, 532

LEGACY—CONTINUED.

4. A bequest to a married woman, "to go to the support of herself and children;" also, "I lend to my daughter, C. D., wife of G. D., the land whereon they now live, with all the household and kitchen furniture which they have in possession; also, one negro woman Winney, one negro girl Ailsie, and one negro, Langley, with them and their increase, to enable her to support, school, and clothe her children, during her natural life, and after her death, to be equally divided between her children, to them and their heirs forever," does not give the husband such an estate in the property; as can be subjected to sale at law, for the payment of his debts. *Jasper & Maclin v. Howard, Trustee,* 652

LIEN.

1. When a *lien* has attached on personal property, by the delivery of a *fieri facias* to the sheriff, which, during the continuance of the *lien*, is removed by the defendant in execution to another State, and sold, it may be levied on and sold, by an *alias* execution, if brought back again to this State.—*McMahan v. Green,* 71
2. When the grantee of the husband, after his death, receives the rents, although the widow, upon a bill filed by her to ascertain and settle her claim for dower, is entitled to a decree for her proportion of the rents so received, the decree for what is due, should be a general money decree, and it is not a lien upon the estate conveyed by the husband so as to override other charges, or liens created by the grantee. *Johnson v. Elliott,* 112
3. An agreement between the distributees of an estate, to divide the property and hold it subject to the debts of the deceased, gives to each of the distributees a *lien* upon the share of the other, for the payment of the debts contemplated; but will not subject the property so divided, in the hands of one of the distributees, to sale under a judgment obtained upon a note executed jointly by all the distributees, to a creditor of the estate for a debt due by the deceased. Whether the creditors of the deceased might not have availed themselves of this agreement in equity, or whether the distributees might not have been sued as executors *de son tort—quere.* *Jones' Adm'r v. Swift,* 144
4. Where the disputed title covenanted to be satisfied, consists in the claim of a former vendor, for notes given by a former purchaser, to whom no deed was executed, these notes constitute a lien, which the obligee may remove on the default of the obligor, and recover the sum paid, by action on the covenant. *Dickson, Jr. v. Briggs,* 217
5. When property is delivered to a warehouseman, indicated by the buyer, the right of property will vest in him, though the warehouseman may have a *lien* on the goods for his charges. Whether such a *lien* would in any case prevent the general property from vesting in the buyer, if the requisites of the sale were complete, *quere.* *Bradford v. Marbury,* 520

LIEN—CONTINUED.

6. Possession of land under a purchase, is notice to a creditor, and will prevent the *lien* of his judgment against the vendor from attaching upon it, though the deed may never have been recorded. *Burt v. Cassety*, 734
7. The *lien* of an attaching creditor, on land, is superior to the title of a purchaser under a subsequent judgment with notice of the levy of the prior attachment. *Baldwin v. Leftwitch*, 838
See Landlord and Tenant, 6.

LIMITATIONS AND NON-CLAIM, STATUTES OF.

1. *Quere*, would not the foreign purchaser acquire a good title by a purchase at a judicial sale, or would not the remedy be lost, if the property had remained long enough in the foreign country, for the statute of limitations to bar an action for its recovery. *McMahan v. Green*, 71
2. A notice of the non-payment of a promissory note, personally served on the executor of an indorser of the note, or which is shown to have come to his hands, although it may come from a notary protesting the note, will be sufficient to withdraw the claim from the influence of the statute of non-claim, if it describe the note with accuracy, and informs the personal representative, who the holder is, and that he looks to him for payment,—ORMOND, J. dissenting. *Hallett and Walker, ex'rs, v. The Branch Bank at Mobile*, 193
3. The deposit, by the maker of a promissory note, with the assent of the sureties, of cotton, with the agreement that its proceeds, when sold, should be applied in payment of the note, will not withdraw the note from the influence of the statute of limitations, although the cotton is sold, and the proceeds applied in payment after the maturity of the note, and within six years before suit commenced. *Lyon, et al. v. The State Bank*, 508
4. A notice of the dishonor of a note, given to the executor of an endorser, before he has qualified as such, is not such a presentment, as will take the case out of the statute of non-claim. *Branch Bank at Mobile v. Hallett & Walker*, 671
5. The absence of an administrator from the State, will not prevent the bar of the statute of non-claim, after it has commenced running. Whether the removal of the administrator from the State, would not justify the revocation of his authority, *quere*. *Br. B'k at Decatur v. Donelson, ad'x*, 741
6. A promise by an administrator, after the expiration of eighteen months after the grant of letters of administration, to pay a debt which had not been presented to him, will not take it out of the statute of *non-claim*.—*Br. Bank at Decatur v. Hawkins, Adm'r*, 755
7. The six months which elapse after the granting letters testamentary, or of administration, are not to be computed in ascertaining whether the pe-

LIMITATIONS AND NGN-CLAIM, STATUTES OF—CONTINUED.

riod prescribed by the statute of limitations as a bar, is complete. *Posey and Coffey v. The Decatur Bank*, 802

8. A statement in writing, describing a bill of exchange by its date, amount, and the character each party on the bill bears in relation to it, and when, and where payable, with the addition that the holder looks to the estate of a particular person for payment, is, if presented to the personal representative of the estate, a sufficient presentation, without producing the original bill. *Ib.* 802

MALICIOUS PROSECUTION.

1. That the plaintiff was guilty of the offence charged, or that the defendant had probable cause for the prosecution, is a full answer to an action for a malicious prosecution. *Whitehurst v. Ward*, 264

MARRIAGE AND MARRIAGE SETTLEMENTS.

1. An *ante-nuptial* contract, by which the wife, before the marriage, conveyed certain slaves and other property to trustees in trust, "to the use of the said C. B. S., and her intended husband, J. C. K., during their natural lives, at the death of either, then to the use of the survivor during his, or her life; at the death of such survivor, then to such child or children of the said C. B. S., and the lineal descendants of such child, or children, as may be then living, to them and their heirs forever; but should there be no child, or children of the said Catherine, nor lineal descendant living at the time of the death of such survivor, then the said property to be equally divided among the next of kin of the said C., who may then be living, to them and their heirs forever. Yet the said C. may, notwithstanding her coverture, by any writing under hand and seal, attested, &c., or by her last will, &c., bequeath, or leave any of the aforesaid slaves, or all of the same, to her said intended husband, or any other whatsoever,"—does not give the wife a separate estate in the property conveyed, but creates a joint estate in the property in the husband and wife during their lives, with remainder to the children: and after it is reduced into possession by the husband, is subject at law to the payment of his debts; a sale under execution, conveying to the purchaser the life estate of the husband, and of the wife during his life. *Cook v. Kennerly & Smith*, 42
2. The law of South Carolina, where the deed was made, requires such instruments to be recorded, and for want of such registration, declares them void, as to creditors, but that as between the parties to the deed it shall be valid without registration. Held, that the provision in relation to creditors, had no *extra territorial* efficacy as a law, and only applied to debts created, or attempted to be enforced, in South Carolina. *Ib.* 42
3. A deed made previous to marriage, by which the property of the wife is

MARRIAGE AND MARRIAGE SETTLEMENTS—CONTINUED.

- conveyed to a trustee, in trust, that immediately after the solemnization of the marriage, the right to the slaves conveyed, and their issues, profits and labor, shall be held by the trustee, for the joint use of husband and wife, during their joint lives, and after the death of one of them, to the survivor, without being in any manner subject to the debts of the husband, does not create a separate estate in the wife, but after reduction into possession by the husband, may be sold under execution against him at law. *Bender v. Reynolds*, 446
4. Whether, if it was shown, that either the statute, or common law of South Carolina, where the deed was made, recognized the settlement, as vesting the wife with an estate, not subject to the husband's debts, it would not be the law of the contract in this State, *quere. Ib.* 446
5. A deed by husband and wife, reciting that the wife is about to become heiress of certain property, and conveying the property to a trustee for the mutual support of the husband and wife, and directing that the profits, uses, and issues, should be paid to the husband and wife, "for their joint maintenance, during their natural lives, or to the survivor of them during the term of his, or her natural life," does not exclude the marital rights of the husband, or create a separate estate in the wife—that the entire equitable interest vests in the husband, and his possession completes the legal estate, for the life of himself, or wife, and may be sold under a *feri facias* against him. *Moss v. McCall*, 630
6. A will conveying property to a married woman, by the terms, "I leave for her use and benefit, as he (the trustee) may think proper, and best, without being subject to her debts, and contracts, in any way whatsoever, or her husband, or any future husband, solely for her support, her lifetime," creates a separate estate in the property, in the wife—*Quere*, will not the prohibition against her charging the estate, by contract, during the coverture be enforced. *Clarke & Co. v. Windham*, 798

MORTGAGOR AND MORTGAGEE.

1. The retention of possession by the mortgagor of personal property, after the law day has passed, is not necessarily a badge of fraud. If the property be suffered to remain with the mortgagor, by the mortgagee, a considerable time, it is a circumstance from which fraud may be inferred, if not satisfactorily explained. If he proceeds with reasonable diligence to foreclose his mortgage, no presumption whatever of fraud arises from the fact, that while the proceedings are in progress, the property is suffered to remain with the mortgagor. *Simerson v. Branch Bank at Decatur*, 205
2. The circumstance that a creditor has foreclosed a mortgage, and obtained a decree for the sale of the mortgaged premises, does not constitute him a judgment creditor, so as to entitle him to redeem the premises from the purchaser, under the act of 1842. *Br. B. at Mobile v. Furness, et al*, 367

MORTGAGOR AND MORTGAGEE—CONTINUED.

3. A bill is not multifarious, because it seeks to foreclose a mortgage upon an entire tract of land; and asks a specific performance as to one-half the land, from the heirs of the vendor of the mortgagor. *Heirs of Holman, et al. v. The Bank of Norfolk,* 370
4. An allegation, that a mortgagor was seized, or pretended to be seized in fee simple of the land, when he executed the mortgage, is a sufficient allegation that he was in possession. *Ib.* 370
5. A mortgagee may release a part of the mortgaged estate, from the operation of his mortgage, without impairing his right to look to the residue; and this, although subsequent to the mortgage, the mortgagor had transferred a part of the estate to others. Whether equity would not grant relief on the ground of fraud, if the mortgagee should collude with the mortgagor, to make the burthen fall on a sub-purchaser of the mortgagor, *Quere. Ib.* 371
6. When lands and slaves mortgaged to several creditors, by agreement between the creditors and the mortgagor, are to be sold, and the proceeds paid in definite sums to each creditor, with preference to each in the order he is named in the agreement, they will not be entitled to interest when the agreement is enforced against them on the cross bill of the debtor, and they stand in the same condition to each other as to default in carrying out the agreement. *Pinkard v. Ingersoll, et al.* 441
7. In such a case, although the proceedings are set on foot by a junior incumbrancer, to enjoin a senior incumbrancer from proceeding to sell under his mortgage, the costs of suit are properly payable by the incumbrancer, to be re-imbursed out of the fund produced by the sale of the mortgaged property. *Ib.* 441
8. A second mortgagee of a slave, may recover the slave of one claiming under the mortgagor, though the first mortgage was forfeited, when the second was executed, and the first is still unsatisfied. *Gardner's Adm'r v. Morrison,* 547
9. When the evidences of debt are delivered up to the debtor, upon a contract importing on its face a sale of personal property, and the debt admitted to be satisfied, nothing short of the clearest, and most convincing proof, that a remedy existed for its recovery, would suffice to convert such a contract into a mortgage. *McKinstry v. Conly,* 678
10. A court of equity will relieve against a sale of the equity of redemption to the mortgagee, for a grossly inadequate price. *Ib.* 678
11. A mortgage being executed in the name of a partnership, by one of the partners, it is not competent to prove the admissions, either of the mortgagee, or the partner who executed it, that it was made to secure a debt due by the firm. *Scott, Harper & Co. v. Dansby,* 714

ORPHANS' COURT.

1. When the hearing of a claim against an insolvent estate is continued to a time beyond that fixed in the first instance for the settlement, the creditor's affidavit (for the omission of which exception is taken) may be filed at any time before the hearing. *Gilbert v. Brashear and Gooch*, 191
2. A copy of a promissory note, evidencing a debt due from an insolvent estate, verified by affidavit, is a sufficient compliance with the statute requiring claims to be filed, and it is competent after objection made, to produce the original. *Rowdon v. Young, adm'r*, 234
3. Where the allegations of a petition for leave to sell the land of a decedent are denied by the answer, the necessity for the sale must appear upon the record by depositions taken as in chancery cases. *McMekin v. Bobo, adm'r*, 268
4. The testimony of one witness, is not sufficient to outweigh the denial of the answer. The statement of a witness that there was a note against the deceased, in the hands of an attorney, upon which suit had been brought against the administrator, is not sufficient, without proof of the genuineness of the signature, or the liability of the estate for its payment. *Ib.* 268
5. The costs of the probate of a nuncupative will, cannot, whilst the probate is in litigation, be considered a debt for which the lands of the estate may be sold by order of the orphans' court. *Ib.* 268
6. When an estate was declared insolvent, previous to the act of 1843, but no progress made in the settlement until afterwards, the subsequent action of the court should be regulated by the last act. *Boggs' adm'r v. Branch Bank at Mobile*, 494
7. When a claim has been allowed, either by the orphans' court, or by commissioners sitting by commission as the orphans' court, if no exception is taken, it will be presumed on error, that proof was made of due presentment. *Ib.* 494
8. Under the act of 1843, partial settlement may be made, and decrees in favor of creditors of an insolvent estate, enforced by execution. *Ib.* 494
9. If no objection is taken by the administrator, to the action of the orphans' court admitting a claim, he will be understood as waiving all objections; and a paper found in the record, making objections to the claim, but not shown to have been brought to the notice of the orphans' court, or a demand of an issue by the administrator, cannot be noticed by an appellate court. *Ib.* 494
10. The orphans' court has no power to direct the sale of land, which has descended to the heirs, for the purpose of more equal distribution; and where after such an order is made, the title is vested in the heirs, the administrator has no power to proceed with the sale. *Quere*, is an order obtained by the administrator for the sale of land compulsory, and may he not for good cause, refuse to proceed, and sell? *McCain's adm'r v. McCain's distributees*, 510

ORPHANS' COURT—CONTINUED.

11. Under the act of 1843, allowing a creditor to appeal, &c. from a decision against him, on the allowance of his account against an insolvent estate, he cannot be heard unless an exception is taken to the decision at the hearing. *Cook v. Davis*, 551
12. Nor can he take exceptions to irregularities in the proceedings previous to the final decree, unless he excepts to such irregularities before going into the settlement. *Ib.* 551
13. The act of 1843 does not impose upon the judge of the county court the duty of causing an issue to be made of his own volition between the creditor and administrator. *Ib.* 551
14. The affirmatory affidavit which the administrator, or another creditor in his name, may require under the act of 1843, should show something for which the estate is responsible as a money demand, or as ascertained damages. A receipt for a note on a third person, to be collected or returned, is not sufficient, unless the affidavit shows the estate is chargeable with some sum of money. *Ib.* 551
15. A note payable to a third person, will not support a claim unless the affidavit shows the claimant has either a legal, or equitable interest in it. *Ib.* 551
16. Where an account cannot be stated in the first instance, by an administrator, the court at the final hearing is authorized to correct any errors or omissions apparent upon the account, or otherwise appearing. *King, adm'r, v. Cabiness' creditors*, 598
17. An administrator *prima facie* is chargeable with interest under the statute upon all receipts until disbursement, and must discharge himself by oath. *Ib.* 598
18. A claim left with the clerk for the purpose of presentation to the administrator, and retained by him until after the estate is reported insolvent, and then filed with the papers of the insolvent estate, is filed sufficiently within the act of 1843, though he does not endorse the time of filing it, on the note, or transfer it to his docket. Nor can he afterwards be allowed to controvert it, by saying he did not consider it as filed. *Gaffney v. Williamson, adm'r*, 628
19. An administrator having, on his final settlement, filed receipts for money paid the guardian of an infant distributee, and claimed a credit to the amount of the payment, upon the decree in favor of that distributee, which was disallowed by the orphans' court, and its judgment affirmed by this court, cannot afterwards move the orphans' court to have satisfaction entered upon the decree, to the extent of the payment shown by the receipts. *Landreth's adm'r v. Landreth's distributees*, 640
20. A bond in the penal sum of \$10,000, by which B bound himself, on condition that D would establish the claim of B, to a right of entry under the pre-emption laws of the United States, and pay to the United States the

ORPHANS' COURT—CONTINUED.

- purchase money thereof, he would deliver to D, his heirs and assigns, a good and sufficient deed of all his right, and title to one half of said lands—is not such an estate, or interest in land in D, though the condition of the bond has been performed, as can be sold by order of the orphans' court, at the instance of the representatives of D, so as to vest in the purchaser the title of D, or to enable the commissioners appointed by the orphans' court, to assign the bond to the purchaser. *Brown v. Chambers, et al.* 697
21. An execution issuing from the orphans' court, for the collection of money, should be made returnable to the regular *semi-annual* term of the county court proper, if there are fifteen days between the commencement of the term, and the teste of the writ; if not, then to the next succeeding term of the county court. *Graham and Abercrombie v. Chandler*, 829
22. Such an execution, when issued, has the same attributes as an execution issued on a judgment at common law, must be executed in the same mode, and may be enforced in the same manner; consequently, a motion may be made against the sheriff for failing to make the money. *Ib.* 829
23. An administrator *ad colligendum*, is the mere agent, or officer of the court, and may be removed at any time, and an administrator in chief appointed. *Flora v. Mennice*, 836
24. A judgment of the orphans' court, dismissing a petition for the removal of an administrator, and the appointment of the petitioner in his stead, cannot be reviewed by an appellate court, unless the evidence offered to the court, or the right of the petitioner to the administration, be shown upon the record. *Ib.* 836

PARTNERS AND PARTNERSHIP.

1. If a partnership, upon its dissolution, convey all its effects to one of the firm, and after such dissolution and transfer, a debtor of the firm promise to pay the individual partner, he may maintain an action in his own name on the promise. *Howell v. Reynolds*, 128
2. When partners execute several notes, in their individual names, for work done for the firm, if there is a total failure of the consideration, the defence may be made by either, when sued upon the note executed by him. *Emanuel v. Martin*, 233
3. Upon a suit by one, on a note due to him from a partnership, a debt from him to one member of the firm, may be set off against the demand due from the firm. *Quere*, where one of several defendants, sets off a demand due to him alone, can he have judgment for any balance in his favor?—*Jones & Co. v. Jones*, 244
4. A judgment in favor of one partner, in a suit in which he alone is a party, is no bar or evidence of payment in another suit by the same plaintiff, against another partner, on the same cause of action. Whether it would not have been competent to have set up, and sustained by proof, the set-

PARTNERS AND PARTNERSHIPS—CONTINUED.

- off, or payment, which enabled the other partner successfully to gainsay the plaintiff's action, even if such payment, or set-off, were made by, or were due to such partner in his individual capacity, *quere*. *McLelland v. Ridgeway*, 482
5. A dormant partner is an allowable, but not an assential party. *Desha, Smith & Co. v. Holland*, 513
6. An obligation signed with the partnership name, but in the body of which it is recited that it was the act of one of the partners, and given as a security for his individual debt, is not on its face a partnership act. *Scott, Harper & Co. v. Dansby*, 714
7. A mortgage being executed in the name of a partnership, by one of the partners, it is not competent to prove the admissions, either of the mortgagee, or the partner who executed it, that it was made to secure a debt due by the firm. *Ib.* 714
8. Upon a bill filed to subject property as belonging to a partnership, to the payment of a debt alledged to be secured by a mortgage of the partnership no decree can be had, upon proof that the property belongs to one of the partners, individually. *Ib.* 714
9. A creditor of the firm, seeking to enforce a debt, cannot be required to produce the original articles of co-partnership. *Griffin v. Doe ex dem. Stoddard and Murphy*, 783

PAYMENT.

1. Where a debtor owing two debts to his creditor, pays a sum of money in gross, and the creditor omits to apply it to either, the debtor, when sued on one of the debts, may insist on the payment to be applied in discharge of that, although the creditor has delayed both debts. *Quere*, if the payment was made for the purpose of extending both debts, and receipted in this way, whether it should not be applied *pro rata*? *Dent, et al. v. The State Bank*, 275
2. A payment by an administrator of an insolvent estate, to a creditor, he binding himself "to hold the administrator harmless, in case said estate on settlement, does not pay enough to cover the above amount," is not an absolute payment, or an admission that the claim is just, but if the claim is rejected for want of presentation in time to the administrator, he may recover back the money so paid. *Gorman v. Nairne*, 338
3. An administrator having, on his final settlement, filed receipts for money paid the guardian of an infant distributee, and claimed a credit to the amount of the payment, upon the decree in favor of that distributee, which was disallowed by the orphans' court, and its judgment affirmed by this court, cannot afterwards move the orphans' court to have satisfaction entered upon the decree, to the extent of the payment shown by the receipt. *Landreth's Adm'r v. Landreth's Distributees*, 640

PLEADING.

1. It is no objection to a count that it states the facts from which the conclusion of indebtedness arises, instead of stating the same conclusion in a common count. *McLeod v. Powe and Smith*, 9
 2. A plea is bad on demurrer, which assumes to answer the entire declaration, and to furnish a bar to the action, and alleges matter which is an answer to only a part of the demand. *Mills & Co. v. Stewart*, 90
 3. A plea, alleging that the defendant had been garnisheed in a court of the State of Louisiana, and a judgment rendered against him on his answer, condemning the debt in favor of a creditor of the plaintiff, setting out the proceedings fully, and alleging that they were conducted according to the law of Louisiana, and that he had paid, and satisfied the judgment so rendered, is good. It is not necessary in such a plea to allege, *in totidem verbis*, that the defendant had no notice of the transfer of the note, when he answered the garnishment. *Ib.* 90
 4. "The south half of section 11, township 15, range 9, with the exception of eighty acres at the west end; and a lot donated for a school house, of land in the Coosa land district," is a sufficient description of the premises sued for, in an action of trespass to try title. *Heifner v. Porter & Simmons*, 470
 5. A plea in abatement to an attachment, because it was issued without affidavit, and because the writ, though properly addressed, commands the plaintiff *eo nomine* to attach the defendant's estate, is bad, because it unites two distinct matters of abatement, and might be stricken out on motion. The defendant, therefore, in such a case, is not prejudiced by the refusal of the court to compel the plaintiff to join issue upon it. *Ellison, et al. v. Mounts*, 472
 6. A dormant partner is an allowable, but not an assential party. *Desha, Smith & Co. v. Holland*, 513
 7. An allegation in the declaration, that the note on which the suit was brought, "was made by B, acting for himself, and as joint owner with W, of the boat," is not an allegation, that B had authority, as the agent of W, to execute the note in his name, so as to make the note evidence under the statute, unless contradicted by a sworn plea. *Brooks & Wilson v. Harris, assignee*, 555
 8. A declaration averring that the defendant undertook to collect a *certain debt*, without showing for what sum, is bad on demurrer. *Posey v. Hair*, 567
 9. The plea of accord and satisfaction, is not an admission of the cause of action, when the general issue is also pleaded. *Prince v. Puckett*, 832
- See Landlord and Tenant, 1.

PRACTICE IN CHANCERY.

1. A denial by a defendant, upon information and belief, not founded on the

PRACTICE IN CHANCERY—CONTINUED.

- personal knowledge of the defendant, will not overturn the positive testimony of one witness, sustaining the allegations of the bill. *Newman v James & Newman*, 29
2. An improper decree of the chancellor cannot be upheld, upon the ground, that he determined a demurrer to the bill improperly, for want of proper parties, and uncertainty. *Grimshaw and Brown v. Walker*, 101
 3. When the decree settling the equities in a suit against a non-resident, directs that it shall be suspended until the statutory bond is given, *quere*, whether a final decree afterwards rendered, during the same term, upon the report of the master, upon a reference directed by the former decree is not within its reservation. *Johnson v. Elliott*, 112
 4. It is error to decree a sum certain to a widow in lieu of dower, to be raised by a sale of the entire estate out of which the dower interest arises. The decree should be for the payment annually of the sum ascertained to be the annual value of the dower interest. *Ib.* 112
 5. A defendant who offers to file an insufficient answer, to purge a contempt, cannot claim as a matter of right to amend the answer. The motion should have been for leave to file a sufficient answer. *Cowart v. Harrod & Flournoy*, 265
 6. When a chancery cause is remanded, with directions that a reference shall be made to the master, this will not warrant the master in acting on the matter without the order of the chancellor, and it is error to confirm his report made without an order. *Keenan v. Strange, et al.* 290
 7. When a decree is reversed and remanded, with directions to pursue a particular course, it stands, when remanded to the inferior court, as if the proper decree had been thus made in the first instance; and the chancellor upon a proper showing, may, notwithstanding the decree of the appellate court, set aside the defendant's default, and let him make his defence by answer. *Ib.* 290
 8. Objections to a bill of revivor, that notice was not given of the intended application to the register, must be made in the first instance to the chancellor, or they cannot be raised in this court. *Heirs of Holman, et al. v. Bank of Norfolk*, 370
 9. Objections for want of proper parties, must be taken advantage of before the hearing. *Alderson v. Harris & Merrill*, 580
 10. Upon a bill filed to subject property as belonging to a partnership, to the payment of a debt alleged to be secured by a mortgage of the partnership no decree can be had, upon proof that the property belongs to one of the partners, individually. *Scott, Harper & Co. v. Dansby*, 714
 11. A judgment creditor is improperly made a party to a bill filed to perfect a title to land, who has never attempted to subject the land to the payment of his judgment. *Burt v. Cassety*, 734

PRACTICE AT LAW.

1. When a suit is brought against several persons, as tenants of the same lands, and A is "admitted to defend as landlord, for each, and all of said original defendants," and pleads not guilty, it is in effect the same, as if he had instituted the suit himself, and he cannot therefore object that a judgment is rendered generally for the damages, without ascertaining the value of the rent of each tenant. *Quere*, can a joint action be maintained, if objected to, against several persons occupying separate parcels of the land. *McCaskle v. Amarine*, 18
2. In an issue between the transferee of a debt admitted as due to the debtor and the attaching creditor, the court may require the transferee to aver the validity of the transfer, and it is not error to refuse to compel the creditor to aver that the debt is subject to his process. *Scott, Slough & Co. v. Stallsworth*, 25
3. Under the trial of such an issue, the debtor, under the act of 1845, is not a competent witness. *Ib.* 25
4. The answer of the garnishee, and the papers in the cause, cannot be looked to as evidence on the trial of this issue. *Ib.* 25
5. When the avails of an action prosecuted by an administrator, would, if successful, be assets of the estate he represents—if unsuccessful, the estate must be charged with the costs; and if a judgment for costs is rendered against him by the court below *de bonis propriis*, it will be here rendered *de bonis intestatis*. *Hutchinson, adm'r, v. Gamble*, 36
6. It is no objection that interest, and damages for non-payment, are included in the same entry of judgment, without specifying the amount of each, separately. *Dickinson v. The Br. Bank at Mobile*, 54
7. Where a judgment is rendered against the plaintiff for a specific sum in a suit commenced by him as administrator, without directing the recovery *de bonis testatoris* its legal effect, until demanded, is *de bonis propriis*, and as such it cannot be given in evidence under a declaration describing it as *de bonis testatoris*. *Quigley v. Campbell and Cleaveland*, 58
8. The judgment obtained against the plaintiff, in a suit by him as administrator, under our statute of set off, even when properly entered *de bonis testatoris*, is no evidence of assets in a suit upon it for a *devastavit*. *Ib.* 58
9. In such a suit on such a judgment, the record of the settlement by the administrator, although of a part of the administration, is admissible evidence, as it, with the vouchers, may show the amount of the debts against the estate, the periods when paid, and the extent to which the party is liable for the alleged *devastavit*. *Ib.* 58
10. A statement made by the clerk of the court rendering the judgment, o. its amount, and payment by the garnishee, though certified as part of the record, is not evidence of the fact of payment. *Mills & Co. v. Stewart*, 90

PRACTICE AT LAW—CONTINUED.

11. A motion to dissolve an attachment on the ground that the cause of action does not warrant that process, can properly be entertained when a new, or amended declaration is filed, setting out a cause of action not within the statute, if the motion is made within the time for pleading in abatement.—
Hazard v. Jordan, 180
12. An allegation in a notice, that the bank would move for judgment on a bill dated the 4th January, 1840, that "it was purchased under the first section of the act of 1843," should be rejected as surplussage. *The State Bank v. Dent and Pattison*, 187
13. Where a suit is brought for the use of another, on a note which, at the trial, appears to be indorsed in blank by several indorsers, and also by the nominal plaintiff, the several indorsements may be filled up at the trial, so as to correspond with the declaration, and that of the nominal plaintiff stricken out. *Pickett v. Stewart*, 202
14. Where upon the record, it appears the issue is joined with one who is not a party, this will be rejected, if the judgment entry shows the trial of an issue between the proper parties. *Del Barco v. Branch Bank at Mobile*, 238
15. An order setting aside a judgment, on condition that the defendant "would not plead matter of abatement, or the statute of limitations," is not confined to the declaration then on file, but applies equally to an amended declaration. *Sawyer v. Patterson*, 295
16. Where evidence is heard by a justice of the peace upon the merits in a suit before him for a trespass, but the cause is eventually dismissed by him for want of jurisdiction, this not being a decision upon the merits, is no bar to a subsequent suit for the same cause of action. *Waddle, et al v. Isher*, 308
17. Where a deposition of a witness comes through the mail sealed, directed to the clerk of the proper court, with the usual post-marks, it may be published, although the name of the commissioner is not written across the seal. *Park v. Bancroft*, 468
18. A suggestion by the plaintiff's counsel, of the bankruptcy of the party who instituted the suit, and the substitution of the assignee in bankruptcy as plaintiff, renders inoperative a plea of the defendant previously filed, alledging the bankruptcy of the plaintiff. *Brooks & Wilson v. Harris, assignee*, 555
19. The answer of a garnishee must be contested at the term at which it is made; and if an issue be subsequently tendered, he may object to joining in it, unless he has expressly, or by implication, waived his right to a discharge. *McDaniel v. Reed*, 615

PRACTICE AT LAW—CONTINUED.

20. If the bond was lost when the declaration was filed, the contents may be proved without an amendment of the declaration. *Lester v. The Governor*, 624
21. When an attachment is sued upon a debt not due, the declaration should not be filed until the maturity of the contract. *Beckwith, et al. v. Baldwin*, 720
22. Where a negro held in this State as a slave, sues for his freedom, if his right to freedom depends upon the law of the place of his birth, the law must be proved as a fact upon the trial of the cause. *Sydney v. White*, 728
23. An objection that a deed was not proved, and recorded, within the time prescribed by law, cannot be made in the appellate court, if not raised in the primary court. *Griffin v. Doe ex dem. Stoddard and Murphy*, 783
24. A creditor of the firm, seeking to enforce a debt, cannot be required to produce the original articles of co-partnership. *Ib.* 783
25. A suit cannot be maintained at law, on a lost bill of exchange, indorsed in blank, whether lost before, or after its maturity, unless an affidavit of the loss be made before suit is brought, as required by the act of 1828. Nor is the case varied by the fact, that the bill was drawn in sets, consisting of first and second, and that the first only, on which the protest was made, is lost, and the second is produced at the trial. *Posey and Coffee, Ex'rs, v. The Decatur Bank*, 802
26. The proper practice, is, to reject illegal testimony when offered, and not to admit it, subject afterwards to be excluded, when the court charges the jury; as it may be impossible to eradicate an improper impression made upon them. An exception to this rule obtains, where a party proposes to make testimony relevant, by evidence to be subsequently offered. *McCurry v. Hooper*, 823

PRE-EMPTION LAW.

1. The right to enter land, under the pre-emption laws of congress, descends to the heir at law, if the occupant dies without performing the conditions imposed by these acts, and obtaining the title. The heir cannot call on the administrator to pay the purchase money to the government out of the assets of the estate, nor the widow to perfect her title to dower. Therefore, where, in such a case, the administrator paid the purchase money due the government, out of the assets of the estate, and took the title to the widow and heirs of the deceased, as tenants in common—held, that an order obtained by the administrator from the orphans' court, for the sale of the land, upon the representation that the estate of his intestate was insolvent, was void, and that the purchaser at the sale obtained no title to the land. That no trust upon the land resulted to the administrator, or the

PRE-EMPTION LAW—CONTINUED.

creditors of the estate, from the fact that the administrator paid the purchase money out of the assets of the estate. Whether, the administrator might enter upon, and sell the mere occupancy of the deceased, *quere.*—*Johnson and wife, et al. v. Collins,* 322

2. Two persons, H. and M., being entitled each to enter eighty acres of land, of the same quarter section, made an agreement, by which M. stipulated, that if he did not pay H. \$100 which he owed him, by the time he was ready to enter his portion of the land, that then he would permit H. to enter the entire quarter section, H. paying M. the value, to be ascertained by a reference to the neighbors. Held, that this was a contract for the sale of the pre-emption, and being in violation of the act of congress of June, 1838, granting pre-emption rights to settlers on the public lands, was void. *Hudson and Hudson v. Milner,* 667

PRINCIPAL AND AGENT.

1. The agency of a party must first be proved by other evidence than his acts, before it can be assumed that his acts are binding on the principal. *Scarborough v. Reynolds,* 252
2. A special authority conferred upon an agent, in the management of a plantation, and the interests connected with it, to demand and sue for all moneys, &c., "subjecting myself to be sued through him, in the same manner as if I was personally present," does not give the agent power to execute a note in the name of the principal. *Ib.* 252
3. Such a power does not authorize a submission of matters in dispute to arbitration, at least until after suit brought. *Ib.* 252
4. An authority to an agent, stated thus, "if you can honorably and fairly settle with Reynolds for me, out of court, do so, if not, let the court and jury settle," does not authorize a reference to arbitrators; nor will authority to exercise a reasonable discretion, or to submit to a reasonable sacrifice, confer such power. *Ib.* 252
5. Neither a remittance of money, to one as the agent of a bank, and his consent to receive it as such, nor his admissions, or the fact that he is a director of the bank, have any tendency to prove that he is the agent of the bank. The consent of the bank that he should so act, is necessary. *Heirs of Holman v. Bank of Norfolk,* 370
6. It is no ground for the rescission of a contract for the sale of land, that one who sold the land as agent, had no authority to act, if the principal ratifies his act, and is able, and willing to make title. *Alderson v. Harris & Merrill,* 580
7. Where one falsely, and fraudulently, represents himself as an agent, authorized to sell land, and gives his own bond to make title, the purchaser cannot be compelled to pay the purchase money, unless he obtains the title, the more especially if the agent is insolvent. *Ib.* 580

PRINCIPAL AND AGENT—CONTINUED.

8. An agent, is an exception to the general rule, and may testify, though he has an interest in the event of the suit. *Bean v. Pearsall*, 592
9. The principal is not a competent witness for the agent, in a suit brought by him against an attorney, for the recovery of a debt due the principal, which the agent had placed in the attorney's hands for collection; as the record would be evidence for the principal, of the amount recovered, in a suit by him against the agent. *Wallace and Lewis v. Peck & Clark*, 768
10. When money is collected by an agent, for persons who are themselves agents, he may discharge himself, either by paying it over to those from whom he received the claim, or to the true owner; but cannot discharge himself, by paying it to the payee of the note, he not being in fact the true owner, and the note not having been received by him from the payee. *Ib.* 768

PRINCIPAL AND SURETY.

1. When an award is about being made, between a principal and one of two sureties, touching certain moneys, alledged to have been placed in his hands for the payment of the debt, the other surety will be bound by it, when made, either by assenting to it when made, or by being present with full knowledge that it is about being made, and not dissenting. *McGehee v. McGehee*, 83
2. A surety, who has been compelled to pay the debt of the principal, may recover at law of a co-surety, not only his proportion of the debt, but under the act of 1839, may also recover his proportion of the part of any other co-sureties shown to be insolvent. But notwithstanding this statute, chancery has concurrent jurisdiction. *Couch v. Terry's adm'rs*, 225
3. Whether the sureties of a justice upon his official bond are bound for the official malversation of their principal, and whether the bond was not intended as a security for the performance of his ministerial duties only, *quere.* *Lester v. The Governor*, 624
4. A deed of trust, or mortgage, executed as an indemnity to the sureties of an executor, will be upheld at law, whilst the liability continues. *Quere*—would not a court of equity, upon a proper indemnity being executed, direct a sale of the trust property, at the instance of a creditor of the grantor. *Hawkins v. May*, 673
5. One of two co-sureties may interpose a claim under the statute, for the benefit of both, and if no objection is taken in the primary court, it cannot be made here. *Ib.* 673

PROCESS, AND SERVICE OF.

1. To constitute the offence of obstructing process, in a criminal point of view, there must be an active opposition; not merely taking charge of a

PROCESS, AND SERVICE OF—CONTINUED.

- debtor's property, keeping it out of view, and refusing when called on by an officer, to place it within his reach. *Crumpton v. Newman*, 199
2. A warrant, which recited, that W C did oppose W A, a constable, in the execution of civil process, by concealing, and keeping concealed, the property of one James Frost, is a nullity, and the party who caused it to be issued, as well as the officer who acted under its authority, are liable in trespass to the party arrested. *Ib.* 199
3. When lands and slaves mortgaged to several creditors, by agreement between the creditors and the mortgagor, are to be sold, and the proceeds paid in definite sums to each creditor, with preference to each in the order he is named in the agreement, they will not be entitled to interest when the agreement is enforced against them on the cross bill of the debtor, and they stand in the same condition to each other as to default in carrying out the agreement. *Pinkard v. Ingersoll, et al.* 441

QUO WARRANTO.

1. A citation issued to a bank, in a proceeding by information, in the nature of a *quo warranto*, on the 21st February, 1843, commanding it to appear at a special term of the court, to be held on Monday, the 28th instant, (the only remaining Monday in the month being the 27th instant,) and the record recites, that a judgment was rendered by default, vacating the charter of the bank, on Monday the 29th of February—Held, that the judgment could not be sustained. *P. & M. Bank v. The State*, 657

RECOGNIZANCE.

1. A judgment *nisi*, on a forfeited recognizance, recited that the recognizance was entered into on "Tuesday, the eighth day of the term." A *scire facias* issued, which pursued this judgment, was served on one of the parties and dismissed, and on motion of the solicitor, another *sci. fa.* was ordered to issue, and leave granted to amend the judgment *nisi*, *nunc pro tunc*; and by the direction of the court, the clerk referred to the judgment *nisi* of the preceding term, and erased therefrom with his pen, the words *Tuesday, the 8th day of the term*, and interlined and substituted "*Wednesday, the 9th day of the term*," and a *sci. fa.* then issued on the judgment as amended, returnable to the next term—Held, that the judgment *nisi* was amendable *nunc pro tunc*, and that the particular mode adopted in this case did not annul the first judgment in toto. *The State v. Craig*, 363

RECORD AND JUDGMENT ROLL.

1. When the record of the proceedings of one State, are offered in evidence in another, authenticated pursuant to the act of congress, presumptions must be indulged favorable to its jurisdiction, where the form of the proceedings does not indicate, that it is a court of limited jurisdiction. *Mills & Co. v. Stewart*, 90

RECORD AND JUDGMENT ROLL—CONTINUED.

2. A statement made by the clerk of the court rendering the judgment, of its amount, and payment by the garnishee, though certified as part of the record, is not evidence of the fact of payment. *Mills & Co. v. Stewart*, 90

REDEMPTION LAW.

1. The term "creditors," in the act of 1842, to prevent the sacrifice of real estate, does not mean creditors at large of the debtor, but such only as have ascertained the *bona fides* of their debts, by obtaining judgment.—*Thomason v. Scales, et al.* 309
2. The circumstance that a creditor has foreclosed a mortgage, and obtained a decree for the sale of the mortgaged premises, does not constitute him a judgment creditor, so as to entitle him to redeem the premises from the purchaser, under the act of 1842. *Br. B. at Mobile v. Furness, et al.* 367

RIGHT OF PROPERTY, TRIAL OF.

1. Upon a trial of right of property, levied on by attachment, the claimant may prove, that the defendant in attachment, at the time he purchased the slaves levied on, declared that he paid for them with the land of the *cestui que trust*, (in whose behalf they were claimed,) and purchased the slaves for their use, the *res gestae*, being the sale and purchase, and not the possession of the slaves; such testimony would be no proof of *consideration*, if the attaching creditor's debt then existed. *Berry, use, &c. v. Hardman*, 604
2. A trial of right of property may be prosecuted in the name of an infant, by a *prochein ami*, who may execute the bond, and if necessary make the affidavit required by the statute. *Strode, et als. v. Clark*, 621
See Attachment, 5.
See Evidence, 16.

SALES.

1. No title passes to the purchaser, by a *private* sale of the property of an estate by the administrator, although the administrator is estopped by his own act from recovering it, by an action in his own name. Nor can the administrator coerce payment of the purchase money, as no right can be derived from an unlawful act; and the contract being void in its inception, the defence may be made, without placing the other party *in statu quo*, by a return of the property. *Fambro v. Gantt*, 298
2. If upon a sale of cotton, there is a stipulation to allow a credit for all over \$1,000 of the price to be paid, until returns for the cotton can be had from Liverpool, it is an agreement to wait for the residue until, by the ordinary course of trade, a sufficient time elapses for a shipment and returns. A mere gratuitous extension of the time of payment, made after the contract was complete, would not be binding. *Bradford v. Marbury*, 520

SALES—CONTINUED.

3. When a credit is stipulated for, upon a sale of goods, suit cannot be brought before the time agreed on for payment. How far this principle may be modified, when the buyer obtains goods upon a fraudulent representation that paper given for them is good, when it is worthless; or when the buyer obtains possession of goods on condition of giving security, and afterwards refuses it, *quere. Ib.* 520
4. It is no ground for the rescission of a contract for the sale of land, that one who sold the land as agent, had no authority to act, if the principal ratifies his act, and is able, and willing to make title. *Alderson v. Harris & Merrill,* 580
5. Where one falsely, and fraudulently, represents himself as an agent, authorized to sell land, and gives his own bond to make title, the purchaser cannot be compelled to pay the purchase money, unless he obtains the title, the more especially if the agent is insolvent. *Ib.* 580
6. When the evidences of debt are delivered up to the debtor, upon a contract importing on its face a sale of personal property, and the debt admitted to be satisfied, nothing short of the clearest, and most convincing proof, that a remedy existed for its recovery, would suffice to convert such a contract into a mortgage. *McKinstry v. Conly,* 678
See Evidence, 20.
See Tax Collector and sales by, 1, 2, 3.

SALES UNDER JUDICIAL PROCESS.

1. A purchase made under a decree in chancery, foreclosing a mortgage, is *prima facie* valid, against a subsequent judgment creditor of the same debtor. But if the debt of the subsequent judgment creditor, existed at the time of the rendition of the decree in chancery, under which he claimed, the *onus* is cast on him of showing, that the decree was rendered for a debt due from the debtor to the complainant, he being also the purchaser. *Simerson v. The Branch Bank at Decatur.* 205
2. Where there has been a public sale of personal property, the purchaser may leave it with the former owner, upon a contract, or from motives of benevolence, and if the act is *bona fide*, it will not be liable to the debts of the former owner. *Ib.* 205
3. A purchaser of a slave at a constable's sale, who has notice of an unregistered mortgage on the slave, may nevertheless protect himself, if the plaintiff in execution had no notice of the mortgage, until after his *lien* attached by the levy of his execution. *Jordan v. Mead,* 247

SET-OFF.

1. The judgment obtained against the plaintiff, in a suit by him as administrator, under our statute of set off, even when properly entered *de bonis tes-*

SET-OFF—CONTINUED.

- tatoris*, is no evidence of assets in a suit upon it for a *devastavit*. *Quigley v. Campbell and Cleaveland*, 58
2. Upon a suit by husband and wife, on a note given to them jointly, for a debt created with the defendants, by the dealing of the wife with the consent of the husband, the defendants may set off an account, not included in the note, created in the same course of dealing. *Case and Eslava v. P. & C. Byrne*, 115
3. Upon a suit by one, on a note due to him from a partnership, a debt from him, to one member of the firm, may be set off against the demand due from the firm. *Quere*, where one of several defendants, sets off a demand due to him alone, can he have judgment for any balance in his favor?—*Jones & Co. v. Jones*, 244
4. Accounts of creditors of the defendant found amongst the papers of the plaintiff's intestate, receipted by the creditors, are, without aid from other proof, no evidence of the payment of money by the intestate, for the benefit of the defendant, so as to make these accounts sets off. *Field's Adm'r v. Bevil*, 608
5. A plea of set-off cannot be interposed to a suit on a bond for unliquidated damages; but by taking issue on such a plea, its sufficiency is admitted. *Brown v. Chambers, et al.* 698

SHERIFF AND HIS SURETIES.

1. A motion against a sheriff, for failing to make money on an execution, which had issued in favor of a plaintiff, who, after the rendition of the judgment, had been declared a bankrupt, must be made in the name of the assignee in bankruptcy. *Gary v. Bates, et al.* 544

SLANDER.

1. A charge of stealing hogs, implies malice in the speaker, notwithstanding there is proof that the charge was currently reported, and believed in the neighborhood in which the parties resided. Evidence in mitigation of damages, is proper where the general issue alone is pleaded, and not where the plea of justification is also interposed. *Shelton v. Simmons*, 466

SLAVES.

1. A negro who, by the law of the place of his birth, is entitled to his freedom when his mother arrives at a particular age, will be entitled to his freedom in this State, though sold as a slave, and brought here before that event happened. *Sidney v. White*, 728
2. Where a female slave is entitled to freedom when she arrives at a particular age, her children born in this State, before the event happens, are slaves. *Ib.* 728
3. Where a negro held in this State as a slave, sues for his freedom, if his

SLAVES—CONTINUED.

right to freedom depends upon the law of the place of his birth, the law must be proved as a fact upon the trial of the cause. *Ib.* 728

SIXTEENTH SECTION.

1. When a school commissioner has drawn school funds from the bank, which he fails to pay over as directed by law, any legal voters of the township may maintain an action against him for the recovery of the money, by motion under the statute. *Burns and Randle v. Minter,* 316
2. When the school commissioners neglect to employ teachers, and refuse to appropriate money in their hands for the tuition of the children of the township, if the children of the township do attend other schools, within its limits, the tuition money may be recovered from them, or any one of them, by any legal voter, for the purpose of defraying such tuition. *Ib.* 316
3. Such a judgment could be rendered in the name of the plaintiff, for the aggregate sum, ascertaining the several sums due each child, or parent, to be satisfied by the payment of these several amounts, to the persons respectively entitled. *Ib.* 316
4. One commissioner, as such, cannot recover from another commissioner, money belonging to the school fund in his hands. *Ib.* 316

STATUTES.

1. The statute authorising suits to be brought on lost bonds, notes, &c. and requiring an affidavit to be made of the loss, is cumulative, and was not intended to repeal any remedy which previously existed. It is therefore competent to prove by other competent testimony, the loss of an instrument on which suit is brought, be the effect of the affidavit, when made under the statute, what it may. *Branch Bank at Mobile v. Tillman,* 214
2. The act of 30th January, 1840, for the collection of rents in the city of Mobile, does not differ from the general attachment law, as it, in effect merely authorizes a suit to be commenced by attachment, for the recovery of rent in the city of Mobile, and is to be governed by the same rule as other suits commenced by attachment. *North v. Eslava,* 240
3. The term "creditors," in the act of 1842, to prevent the sacrifice of real estate, does not mean creditors at large of the debtor, but such only as have ascertained the *bona fides* of their debts, by obtaining judgment.—*Thomason v. Scales, et al.* 309
4. The act of 1841, declaring, that a note payable to the cashier, may be sued on and collected as a note payable to the bank, applies equally to notes which were executed at the time of its passage, and to those which have been since made. *Davis, et al. v. Branch Bank of Mobile,* 463
 See Constitutional Law, 1.
 See Husband and Wife, 5.
 See Indictment, 1.

SUMMARY PROCEEDINGS.

1. A motion against a sheriff, for failing to make money on an execution, which had issued in favor of a plaintiff, who, after the rendition of the judgment, had been declared a bankrupt, must be made in the name of the assignee in bankruptcy. *Gary v. Bates, et al.* 544
See Judgment and Decree, 6.

TAXES, TAX COLLECTOR, AND SALES BY.

1. A sale of land for taxes cannot, under our statutes, be sustained where the delinquent, at the time or the distress, has goods and chattels within the county. *Scales v. Alvis,* 617
2. No personal property is exempt from levy and sale, when the object is the collection of delinquent taxes. *Ib.* 617
3. An advertisement of lands the sale of for taxes must be published three months, (in the case of resident delinquents,) and two irregular advertisements for that space of time, cannot be coupled together, so as to authorize the sale, although a verbal consent to this course is given by the delinquent. *Ib.* 617
See Corporation, 1, 2.

TENDER.

1. Under a special contract to sell slaves to one upon the payment of a sum certain at a specified day, the title vests in the party to whom they are to be sold, by the tender of the money, and when the tender is made by an administrator and refused, yet the administrator, by the act of tender and refusal becomes the bailee of the money, and as such may be sued by the executor of the other party, where he has successfully sustained an action of detinue, on the ground that the title vested in the estate by the act of tender. *McLeod v. Powe and Smith,* 9
2. But, unless the money is actually tendered upon condition that a title is made, the only relief is to enjoin the vendor from proceeding for the price until he gives indemnity against the outstanding incumbrance. *Hunter v. O'Neil,* 38

TRESPASS.

1. Rent in arrear, or falling due, is merely a debt due from the tenant to the landlord, for the payment of which he has, under the statute, a lien on the crop grown on the premises, and when it is removed, either by the tenant or a stranger, he cannot maintain trespass for its recovery. *Thompson v. Spinks,* 155
2. A defendant, by electing to *recoup* the damages, when sued for a breach of contract, thereby precludes himself from afterwards suing for damages, for the same injury, but may still maintain an action for a trespass, which could not have been *recouped* in the former action. *McLane v. Miller,* 643
See Trover and Conversion, 2.

TROVER AND CONVERSION.

1. Where wood has been converted and made into coal, by the defendant, the owner is entitled to maintain trover for the coal. *Riddle v. Driver*, 590
2. One who receives goods as a warehouseman, from one who obtained them by the commission of a trespass, and on demand, refuses to deliver them to the owner, is not liable to be sued in trespass. Trover, or detinue, is the appropriate action. *Prince v. Puckett, Ex'r*, 832

TRUSTEE AND CESTUI QUE TRUST.

1. When slaves are conveyed in trust for the use of another, he is entitled to the possession to make the use effectual, unless the deed expressly declares the *cestui que trust* is to be entitled only to the profits. The employment in the deed, of the term, "in their actual possession," would not justify the trustees in withholding the possession from the *cestui que trust*. *Cook v. Kennerly & Smith*, 42
2. The possession of the *cestui que trust*, is not within the second section of the statute of frauds. *Quere*, would it not apply to a trustee, who retained possession of the trust estate, without registration of the deed. *Ib.* 42
3. A trustee of a married woman, to preserve her separate estate, is not responsible for medical services rendered to slaves, constituting her separate estate, they not being in his possession, or the services rendered at his request, and he never having promised to pay the value of the services. *Hodges v. Hoole*, 177
4. *Quere*, who is entitled to money in the hands of a trustee of a deed of trust, fraudulent in law, and therefore void as against creditors? Does it belong to the creditors generally who assert a title to it, or only to those who refuse to come in under the commission? *Reavis v. Garner, et als.* 661
See Pre-emption Law, 1.

USURY.

1. An assignee of a note cannot recover of the assignor usurious interest, which in a suit by the assignee against the makers of the note, had been deducted from it, the assignee being a party to the contract, by which the usury was reserved. *Lloyd v. Pace*, 637

VENDOR AND VENDEE.

1. A vendee claiming to have purchased land by delivering up the note of the vendor, must, as against the existing creditors of the vendor, prove that the note evidenced a real debt. *McCaskle v. Amarine*, 18
2. A deed drawn by an attorney, for land, by the direction of the vendor, is sufficiently delivered to the vendee, though not present, if left with the attorney for the purpose of registration, or, after its execution, taken by the vendor, for the purpose of being handed to the clerk to be registered.—*Burt v. Cassety*, 734
3. When a vendor, upon the sale of a tract of land for a sum in gross, inno-

VENDOR AND VENDEE—CONTINUED.

cently represents it as containing 300 acres, when in fact it contains but 282 acres, and the vendee sometime afterwards accepts a deed from one in whom the legal title is vested, reciting that the tract contains but 282 acres, after which the vendee executes his notes to the vendor for the purchase money unpaid, without objection; and there being evidence tending to establish, that the *locality* was a leading inducement to the contract—the vendee cannot have compensation for the deficiency, as the inference from the facts, is, that if the deficiency had been known at the time of the sale, the terms of the contract would not have been altered. *Capshaw, et al. v. Fennell*, 780

See Attachment, 8.

See Covenant, 1.

See Evidence, 2, 3, 4, 5.

See Fraud, 1, 5, 6.

VERDICT.

1. Where the jury, upon an indictment for assault and battery with intent to commit murder, and for an ordinary assault, return a general verdict of guilty, or a verdict finding one defendant guilty of an assault with *intent to kill*, and the other guilty of an assault and battery, without assessing a fine, it is no error for the court to send the jury out with instructions to return a final verdict. *Hughes v. The State*, 458

WILLS AND TESTAMENTS, AND PROBATE OF.

1. When a will is contested, either in chancery, or in the orphans' court, the heir is entitled to an issue of *devastavit vel non*, if he demands it. *Hill v. Barge*, 687
2. When a will offered for probate is in the hand-writing of the person to be benefitted by it, before the will can be admitted to probate, it must be satisfactorily established, that the testator knew its contents. If, in addition to the will being written by the beneficiary, other suspicious circumstances exist, such as extreme debility of the testator, and great confidence reposed by him in the writer, [the demand of the law for proof of knowledge of the contents of the will, will be increased. *Ib.* 687
3. A will, to be attested in the presence of the testator, must be witnessed within his view. It is not necessary to prove that he actually saw the witnesses attest the will; it is sufficient if, from their relative position, he could see them. *Ib.* 687

WITNESS.

1. A witness who stated, that he had made a contract with the claimant for the purchase of the premises in question, which he considered advantageous, and that the claimant was to put him in possession as soon as he

WITNESS—CONTINUED.

- could, is an incompetent witness, on the ground of interest for the claimant, in an action of forcible entry and detainer, to recover the possession, though the witness also swore, he would not lose or gain by the event of the suit. *Carter and Ott v. Mundy*, 132
2. The grantor in a deed is a competent witness to impeach it for fraud, if he was not interested in some way to render him incompetent on that ground. *Sims v. Killen*, 497
3. One joint maker of a note not sued, is not a competent witness for his co-maker without a release. *Kornegay v. Salle*, 534
4. A witness who has a certain, immediate, and direct interest, in the event of a suit, cannot be examined as a witness, though the record itself of the suit, would not be evidence, either for or against him. *Bean v. Pearsall*, 592
5. An agent is an exception to the general rule, and may testify, though he has an interest in the event of the suit. *Ib.* 592
6. Whether a witness whose opinions are offered in evidence as an expert in any art or science, is competent to testify, is to be determined by the court, either by examining the witness himself, or from the testimony of others. *Tullis v. Kidd*, 648
7. One who is not engaged in the practice of physic, may nevertheless be competent to testify, if he shows that he had studied the science of medicine, and felt competent to express a medical opinion upon a particular disease. The fact that he was not a practising physician would go to his credit. *Ib.* 648
8. After a witness has been admitted to testify as an expert, evidence cannot be given to the jury of the opinions of other experts in the same science, that the witness was qualified to draw correct conclusions, in the science on which he had been examined; though such testimony would have been properly offered to the court, to show the competency of the witness. *Ib.* 648
9. The principal is not a competent witness for the agent, in a suit brought by him against an attorney, for the recovery of a debt due the principal, which the agent had placed in the attorney's hands for collection; as the record would be evidence for the principal, of the amount recovered, in a suit by him against the agent. *Wallace and Lewis v. Peck & Clark*, 768
- See Chancery, 15.
- See Deposition, 1.

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